PP

v.

JOHAR MUSTAFA

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-21-2000]
23 JUNE 2003

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Whether accused in actual possession of cannabis - Whether legal presumption of trafficking under s. 37(da) could be invoked*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in cannabis - Analysis of dangerous drug - Whether carried out properly - Dangerous Drugs Act 1952, s. 37(j)*

EVIDENCE: *Witness - Principal witness, evidence of - Whether there was reason to doubt evidence of witness - Whether evidence corroborated*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof to be applied - Maximum evaluation - Prima facie case - Whether established*

CRIMINAL PROCEDURE: *Trial - Defence - Whether a mere denial - Whether prosecution proved guilt of accused beyond reasonable doubt*

CRIMINAL PROCEDURE: *Prosecution - Witnesses - Witnesses neither named nor made available for cross-examination - Whether there was a gap in prosecution's narrative - Whether all essential witnesses called*

The accused was charged with trafficking cannabis weighing 19,152 grams, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the Act. The accused had been involved in a motor accident that was witnessed by one Kamisan Awi ('SP5') and his friends. SP5 offered assistance which was refused by the accused. He saw the accused open the boot of his car, take out a blue package and throw it to the right front side of the car. SP5 telephoned the police which subsequently arrived and apprehended the accused as he tried to run away. SP5 pointed out to the police the direction in which the accused had thrown the blue package. The police found the package and suspected that it contained cannabis; they subsequently arrested the accused. The package was analysed by a government chemist ('SP3') and found to contain 19,152 grams of cannabis within the meaning of the Act. The accused submitted that: (i) SP5's friends were not named and

called as witnesses to be cross-examined; (ii) the evidence of SP5 could not be believed; (iii) there was no evidence of the weight of the samples analysed as per *Loo Kia Ming v. PP*, where the Court of Appeal held that 10% must be analysed; and (iv) at the close of the prosecution case, s. 37(da) of the Act could not be invoked as there was no proof of actual possession by the accused.

Held:

[1] With respect to the issue of the weight of the samples analysed, SP3 had carried out all tests that in the considered view of the Court of Appeal in *Wan Mohd Kamil Wan Mohamad v. PP* amounted to a detailed analysis of the plant material. His evidence could not be faulted. Cross-examination had not cast any doubt on the weight of cannabis stated by SP3, who had used twice over the number of samples used in *Wan Mohd Kamil (supra).* There was no doubt whatsoever that the plant material examined by SP3 was indeed cannabis as defined in s. 2 of the Act. (p 213 d-e)

[2] On the facts, everything that SP5 said was corroborated and/or borne out by other evidence. Therefore, there was no reason to disbelieve SP5's evidence. (p 206 e)

[3] There was no burden on the prosecution to prove its case beyond reasonable doubt at the close of the prosecution's case. Whether it had done so was a question that must be dealt with at the close of the whole case. (p 201 g)

[4] The maximum evaluation of the prosecution evidence showed that the accused was in actual possession of the cannabis in question, and that at the material time of possession, the accused was consciously moving the said package containing the said cannabis from one place to another. The weight of the cannabis was almost 100 times the stated weight that would attract the legal presumption of trafficking under s. 37(da) of the Act, and was not consistent with passive possession and/or self-administration. Rather, the act of transporting cannabis of that weight was only consistent with the act of trafficking, and even without legal presumptions, there was clear, strong and credible evidence for each ingredient of trafficking. Thus, there was a *prima facie* case for the accused to enter a defence against. (p 222 e-g)

[5] On the facts, the story of the accused that he opened the boot only to look for tools, and that there was no nexus between him and the package containing cannabis, could not be believed in light of the total evidence. Apart from that, the rest of the accused's defence was a denial, which

was not a sufficient response. Despite the large quantity of drugs involved, there was no attempt to displace the inescapable inference that it was trafficking and there was no evidence to suggest that it could have been passive possession or anything else. Having regard to the evidence and the circumstances as a whole, the prosecution had proved the guilt of the accused beyond a reasonable doubt. (p 237 e-h)

[6] With regard to the contention of the defence that the friends of SP5 were neither named nor made available for cross-examination, all witnesses essential to the unfolding of the narrative of the prosecution case had been called. Although SP5's friends were neither named nor called to take the stand, there was no gap in the narrative of the prosecution. The prosecution could not be expected to trace and call each and every person present at the scene. It had proved the charge beyond all reasonable doubt without any gap or break in the evidence and without the aid of legal presumptions. There was no doubt whatsoever that the accused was trafficking, and must consequently suffer the only sentence permitted by law. (p 238 c-e)

[Accused to be hanged by the neck until he is dead.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(refd)***
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Au Ah Lin v. PP [1963] MLJ 365 ***(refd)***
Cheng Heng Lee & Anor v. PP [1999] 1 SLR 504 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
In the Matter of Seven Witnesses Sentenced Summarily for Perjury [1906] 8 HKCU 1 ***(refd)***
Jonaidi Mansor v. PP [2002] 1 CLJ 730 CA ***(foll)***
K Saravanan v. PP [2002] 4 CLJ 144 CA ***(refd)***
Lee Ing Chin v. Gan Yook Chin [2003] 2 CLJ 19 CA ***(refd)***
Leow Nghee Lim v. R [1956] MLJ 28 ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(foll)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin & Anor [1997] 2 CLJ 752 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamad Radhi Yaacob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamad Radzi Abu Bakar v. PP [2002] 3 CLJ 794 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***

Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Pang Chee Meng v. PP [1992] 2 SCR 1 ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Chan Ah Kow & Anor [1988] 1 CLJ 821; [1988] 2 CLJ (Rep) 186 HC ***(refd)***
PP v. Cheng Meng Bong & Ors [1966] 1 MLJ 237 ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180 ***(refd)***
PP v. Kesavan Petchayo [2001] 7 MLJ 144 HC ***(refd)***
PP v. Lau Chi Sing [1988] 1 MLJ 383 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Ling Tee Huah [1982] 2 MLJ 324 ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2002] 4 MLJ 13 HC ***(refd)***
PP v. Rosman Ismail [2003] 5 CLJ 139 HC ***(refd)***
PP v. Saimin & Ors [1971] 2 MLJ 16 ***(refd)***
PP v. Tan Ann Chye [2003] 5 MLJ 1 ***(refd)***
Regina v. Harrington and Scosky [1964] 1 CCC 189 ***(refd)***
Regina v. Lorne Binkley 69 CCC (2d) 169 ***(refd)***
Rex cv. Container Materials Ltd et al 74 CCC 113 ***(refd)***
Roslim Harun v. PP [1994] 2 CLJ 486 SC ***(refd)***
Saminathan & Ors v. PP [1955] MLJ 121 ***(refd)***
Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor [1999] 6 MLJ 800 HC ***(refd)***
Syed Feisal Yahya v. PP [1992] 2 SLR 190 ***(refd)***
Tan Khoon Eng v. PP [1992] 2 MLJ 132 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wan Mohd Kamil Wan Mohamad v. PP [2003] 1 CLJ 665 CA ***(foll)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yeap Teong Tean v. PP & Another Case [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(i)
Dangerous Drugs Act 1952, ss. 2, 37(da), (j), 39A(2)
Evidence Act 1950, s. 114(g)
Excise Act 1961, s. 61
Federal Constitution, arts. 5(1), (3)

Misuse of Drugs Act [Sing], ss. 2, 5

For the prosecution - Haslinda Abu Bakar
For the accused - Latifah Ariffin; M/s Latifah Ariffin & Co

Reported by Suresh Nathan

JUDGMENT

Jeffrey Tan J:

The accused was tried for the following capital offence.

> Bahawa kamu pada 2hb Mei 1999, jam lebih kurang 10.10 malam, di Km 132.5, Jalan Johor Bharu-Segamat, di Chaah, dalam daerah Segamat, dalam Negeri Johor telah didapati mengedar dadah berbahaya Ganja seberat 19,152 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

12 witnesses in all testified for the prosecution, but the account of the prosecution story should begin with the testimony of one Kamisan bin Awi (SP5) who testified that on 3 May 1999 at about 8.45pm, he was at Desa Temu Jodoh, Chaah, Johor, at the food-stalls by the side of the road to Yong Peng. There were many people at those food-stalls, about six food-stalls, which were all open for business. The luminosity was good – there were streetlights and stall-lights. He was seated with his friends. But at about 9pm, as he was sitting and drinking with his friends, he witnessed a motor accident. A white car from the direction of Segamat to Yong Peng suddenly "melanggar" (went off the road). The car was avoiding a motorcyclist turning into the village. That car went off the road and stopped at an embankment, with its front facing Segamat. He was across the road, about 35 feet from where the car had stopped. With his friends, he crossed the road to render his assistance. When he reached the car, the driver was trying to get out from the car, through the door of the driver. The driver got out from the car on his own. There were no passengers in the car. The driver was the accused. He offered his assistance to the accused. The accused refused to accept his assistance. The accused drove him and his friends away. "Keadaan OKT macam cemas." He and his friends walked back to the food-stalls. There, he saw the accused opening the boot of the car. The accused took out a large package and threw the same to the right front side of the car. That package was dark blue in colour, "berdasarkan cahaya pada malam itu". "OKT campak bungkusan ke sebelah tempat pemandu." "Sebab saya rasa curiga, saya dan kawan hubungi polis, melalui telepon awam berhampiran warong". At the telephone booth, he could see the accused all by himself near the car. After he had telephoned the police, he returned to the food-stalls. He continued his observation of the car and the accused. No one approached the car. About 1/2 an hour later, a tow truck arrived at the scene. That tow truck departed without towing away the car. Then the police arrived at the scene. At the moment of arrival of the police, the accused moved away from the car. The police pursed the accused. "Rakan-rakan jerit ke mana arah OKT telah beredar." The accused was apprehended.

He and his friends walked over to the stationary car. The police were searching the area. He pointed out to Corporal Rosli bin Hamid (SP6) the direction in which the accused had thrown a package. Thereafter the police recovered a package. He returned to the food-stalls. SP5 identified P6B as the blue package, then with contents he said, thrown by the accused.

Under cross-examination, SP5 related that prior to arrival of the police, the accused was near the stationary car. The car stopped directly in front of the food stalls, about 35 feet in front of him. He and 4 others went over to the car. "Saya kenal semua yang pergi." The accused said that he did not require any assistance. It was dark at the place of the incident. He observed the face of the accused for about 10 minutes. The boot had lights. He saw a package being taken out. "Saya nampak satu benda dibuang, tetapi saya tak tahu bentuknya." The package was thrown to a place beside the stationary car. His friends were with him when he telephoned the police. "OKT berlari anak-anak … ke arah Yong Peng." He saw the police searching for something near the stationary car. He pointed out to the police the direction in which the package a thrown. It was the police and not him who found the package.

Under re-examination, SP5 testified that he said he was driven away as the accused told him to leave the place. "OKT kata pergilah, pergilah." Although it was dark, there was light from the food-stalls and streetlights. At the place he was seated, the light was sufficient for him to observe the accused. "Saya pasti saya nampak OKT campak bungkusan ke sebelah tempat pemandu, iaitu di sebelah kana kereta yang sedang terbabas". "Saya pasti saya melihat bungkusan itu berwarna biru kehitaman, berdasarkan cahaya pada masa itu. Saya nampak bungkusan dikeluarkan sebab ada cahaya lampu dari boot kereta, sewaktu boot dibuka". When he spoke to the accused, the accused was one foot away from him. "Saya pasti polis jumpai bungkusan di tempat mana saya telah tunjukkan. Saya saksikan polis jumpa."

Corporal Rosli bin Hamid (SP6) testified that on 2 May 1999 at 10pm, as he and Corporal Mustapha bin Abdul Hamid (SP8) and Lance-Corporals Asnor and Khamis were about to go on their rounds, he was informed by Corporal Zauhari bin Abdullah (SP10) that someone telephoned and informed that a car had skidded off the 132.5 km Johor Baru to Segamat Road and that the driver had in suspicious circumstances thrown out a package from the car. They (SP6, SP8, SP10, and Lance-Corporals Asnor and Khamis) proceeded to the stated place. At the main entrance to the Chaah Police Station, they encountered Inspector Goh Chee Meng (SP11). He informed SP11 of the information that was received. SP11 said he would follow them. When the police party reached the stated place, he saw a white stationary car on the left side of the road towards Yong Peng. A male person was squatting near that car. He (SP6) was

seated in the front passenger seat of the police land rover, and about 10 feet away that person. He alighted from the police land rover. But at that very moment, that male person got up and turned towards the direction of Yong Peng. That person attempted to ran away. That person ran. Except for the police driver, the entire police party gave chase. A few persons at the nearby food-stalls shouted that that person was the driver of the car. That person was apprehended about 35 feet away from the car. That person was brought to the stationary car. That person was the accused. Before he was apprehended, the accused was the only person near the stationary car. While Lance-Corporal Asnor and SP10 guarded the accused, the rest of the police party searched the immediate area. The registration number of the car, a Nissan Bluebird, was WBB 6888. The area in front of the car was dark, but the area at the back of the car was bright, because of light from the food-stalls. As he was searching the area, a few persons arrived at the scene. One of them was SP5 who informed him that he (SP5) saw the driver throwing a package. SP5 pointed out the direction in which the package was thrown. He saw a blue package on top of the earth embankment near the right front side of the car. He notified SP11 who instructed SP8 to take a photograph of the car and package. Prior to the information given by SP5, he had not searched the area of the embankment. After SP8 had taken his photograph, they (SP6, SP8 and SP11) proceeded to the place of the package. He found a blue package tied with a string. SP11 instructed him to open that package. He opened that package. Inside were many compressed blocks of a plant material wrapped in translucent plastic. SP11 said it was cannabis. SP11 ordered the accused to be handcuffed. The accused was near the stationary car and could see what the police were doing. SP11 instructed SP8 to take a photograph of the package. There were 21 compressed blocks in the package. He informed SP11 of the number of compressed blocks. They (SP6, SP8 and SP11) carried the package from the embankment to the area of the stationary car, to a place near the accused. "Inspector Goh buat pemeriksaan di sekeliling lagi sekali. Pemeriksaan itu adalah lebih lurus pada tadi. Pemeriksaan itu tidak jumpa apa-apa lagi." SP11 searched the car. "Inspector Goh tidak jumpa apa barang salah di dalam kereta terbabas." The accused had a small bag. He took possession of that bag. Inside were a hand-phone and car keys. He took possession of the wallet of the accused. Inside that wallet were about RM2,000 and S$10, and a Malaysian identity card of one Johar bin Mustapha. Then one Halim bin Kadir arrived at the scene in a red car. Halim said that he was a friend of the accused and that he wanted to tow the car. He arrested Halim. He found nothing incriminating on Halim. He contacted the Segamat Police Station for the assistance of a dog unit. The dog unit arrived at about 11pm. When the dog unit arrived, SP11 instructed him to search the red car. He instructed SP8 to

guard the package. He opened the door of the red car, a Proton Satria bearing registration number JEL 2591, with the keys taken from Halim. He took possession of a hand-phone and small bag lying on the front passenger seat of that red car. Thereafter, he resumed custody of the package. The dog unit headed by Sergeant Elijah a/k Tanong (SP9) searched the car, the immediate area outside the car, and the surrounding area. "Pengesanan anjing mengambil masa lama. Setahu saya, unit anjing tidak jumpa apa barang salah." SP11 and SP8 escorted the accused to the Chaah Police Station. He returned to the Chaah Police Station in the police land rover. He had custody of the package. At the Chaah Police Station, he lodged his report (P21), and prepared the search list (P24). He handed all items listed in P24 to Inspector Zawahir bin Yaacob (SP12). SP12 marked each of the 21 compressed blocks. He also handed the accused and Halim to SP12. The position of the car, in relation to the road, was slanted, and the boot of the car was nearer the food-stalls than the front of the car. There was luminosity from the streetlights and from the food-stalls.

Under cross-examination, SP6 testified that he conducted the search after the accused was apprehended and brought to the area of the stationary car. Prior to the information of SP5, the police party had searched the area for about 10-15 minutes. After the information of SP5, within 1 minute the package was discovered. The embankment was higher than the car. The embankment was about 1 or 2 feet from the car. When he first saw the accused, he (SP6) was inside the land rover. The police party pursued the accused. The accused was not arrested near the stationary car. When the package was discovered, the accused was not inside SP11's car. When the package was discovered, the accused was near the area of the boot of the stationary car.

Under re-examination, SP6 testified that the search prior to the information of SP5 was only for a short while. "Pemeriksaan itu sekejab sahaja." The earth embankment was about 4 feet high. The accused was arrested about 30 feet from the white car. "Di tempat kereta terbabas, cahaya lampu ada kenal."

Corporal Mustapha bin Abdul Hamid (SP8) testified that at the same said 132.5 km, he saw "sebuah kereta terbabas di sebelah jalan henghala Yong Peng". There was a male person squatting behind the boot of that car. "Sebaik sahaja turun dari land rover, saya nampak lelaki tersebut bangun dan berlari ke arah Yong Peng, di bahu jalan. Kami pun terus mengejar cuma pemandu tidak kejar." Whilst giving chase, he heard shouts "yang melarikan ialah pemandu kereta terbabas". About 30 feet from the car, SP6 apprehended that person. That person was brought to the area of the stationary car. At the area of the stationary car, SP11 instructed Lance-Corporal Asnor and SP9 to guard that person. He, SP6 and SP11 searched the area. That car had registration number WBB 6888. "Dalam pemeriksaan itu kami tidak jumpai apa-apa salah." Then

a group of persons came over to the scene. SP5 spoke to SP6 and indicated a certain direction, to SP6. He and SP6 then proceeded towards the direction indicated. He and SP6 found a blue plastic package. SP6 notified SP11 of their discovery. SP11 instructed him to take photographs of the scene and package. SP11 instructed SP6 to open the package. SP11 was present when SP6 opened the package. He saw many compressed blocks wrapped in translucent plastic. "Kemudian Inspector Goh arahkan anggota yang mengawal lelaki yang ditahan supaya mengari lelaki itu." The package was on top of the embankment which was slightly higher than the car. He and SP6 removed the compressed blocks from the package. There were 21 blocks of a compressed plant material wrapped in translucent plastic. Those blocks were then put back into the package and taken to the area of the car. Then one Halim bin Kadir arrived at the scene. Halim spoke to SP6. Halim said he was a friend of the accused. SP6 arrested Halim. SP6 instructed him to watch over the package while he (SP6) escorted Halim to Halim's car. He watched over the package for about 5 minutes. SP6 returned and said he did not find anything incriminating in Halim's car. He returned the custody of the package to SP6. Before the package was discovered, SP11 had searched the car of the accused. Nothing incriminating was found in that car. The dog unit arrived at about 11.15pm. The dog unit was headed by SP9 who arrived with Corporal Murugiah and 2 dogs. The dog unit searched the car, and the area around the car. "Dog unit tidak jumpai apa-apa barang salah. Dog unit buat pemeriksaan agak lama juga." He and SP11 escorted the accused to Chaah Police Station. SP6 had custody of the package. The car of the accused was towed to the Chaah Police Station. Lance-Corporal Asnor drove Halim's car to the Chaah Police Station. The entire party reached Chaah Police Station at about 3.30am. At the Chaah Police Station, he handed the accused and Halim to SP6. The distance of the food-stalls to the car was about 30 feet. The food-stalls were open for business at the material time. The lights of the food-stalls were lit. There were many people at those stalls. The area near the car was illuminated by light from the food-stalls. It was bright in the vicinity of the car. The boot of the car was closer to the food-stalls than the front of the car.

Under cross-examination, SP8 testified that the accused "berlari anak bukan pantas". Except for the police driver, the entire police party pursued the accused. The initial search had not uncovered anything incriminating. After the initial search, a group of persons came over to the scene. One of them spoke to SP6 and pointed to a certain direction to SP6. Thereafter, he, SP6 and Inspector Gan proceeded in the direction indicated. They immediately discovered the package. Under re-examination SP8 testified that the initial search was in the area around the stationary car. Light from the food-stalls lit the area of the car.

Sergeant Elijah a/k Tanong (SP9) testified that at 10.30pm on 2 May 1999, he received a request from the Operations Room, Segamat Police Station, to provide the assistance of his dog unit. He proceeded to the stated place with Corporal Murugiah, and two police dogs, "satu anjing dadah dan satu anjing jenayah". They arrived at the 132.5km. Jalan Segamat – Yong Peng at about 11.30pm. He reported to SP11 who instructed him to search a car bearing registration number WBB 6888. "Lepas saya turunkan anjing dadah. Ada buat pemeriksaan di luar and di dalam kereta, Tidak jumpai apa-apa barang salah. Saya buat pemeriksaan meliputi kawasan 50 meter sekeliling kereta. Saya mengambil masa 20 minit untuk menjalankan pemeriksaan. Saya tidak guna lampu suluh, sebab is agak cahaya." SP9 was not cross-examined.

Lance-Corporal Zauhari bin Abdullah (SP10) testified that on 2 May 1999 at about 10pm, he received a telephone call from a member of the public who informed him that a car "telah terbabas berhampiran Desa Temu Jodoh Chaah dan pemandu kereta tersebut telah membuang satu bungkusan besar yang mencurigakan". He conveyed that information to SP6 who instructed him, Lance-Corporal Asnor and Corporal Khamis to proceed to the stated place. At the stated place, "saya nampak sebuah kereta warna putih terbabas dan seorang lelaki cangkung di luar belakang boot kereta." But as the police party were alighting from the police land rover, that person suddenly got up and ran in the direction of Yong Peng. The police party gave chase. Whilst giving chase, he heard shouts "pemandu kereta itu sedang berlari" coming the direction of the food-stalls. About 30 feet from the car, SP6 apprehended that person. That person who was the accused was brought to the place of the car. SP11 instructed him and Lance-Corporal Asnor to guard the accused. He and Lance-Corporal Asnor stood guard over the accused in the area at the back of the boot of the car. SP11, SP6 and SP8 conducted a search. Later, SP5 walked over from the food-stalls and spoke to SP6. SP6, SP8 and SP11 then proceeded to a place nearby, to the embankment on the right of the car. He then heard "ganja, ganja". SP11 then instructed him to handcuff the accused. SP6, SP8 and SP11 came down from the embankment with a blue package. That package was tied with a string and had contents. One Halim bin Kadir came to the scene. Halim said to SP6 "dia dapat telefon dari kawan terbabas itu suruh datang". SP6 arrested Halim. A dog unit led by SP9 later arrived at the scene. The dog unit searched the car and the surrounding area. "Semasa saya berada di tempat kejadian saya dapati tempat itu ada cahaya yang datang dari lampu jalan dan lampu-lampu warong. Ada 4-5 warong dan semua beroperasi. Jarak warong ke tempat kejadian adalah lebih kurang 35 kaki."

Under cross-examination, SP10 testified that he did not record the particulars of the caller. Within 5 minutes the police party had reached the stated place. He stood guard over the accused in the area at the back of the boot of the car. The accused, whilst he was under guard, did not attempt to run away. "Saya lihat orang awam tunjuk tempat." Under re-examination, SP10 said that the Chaah Police Station was located at the 138 km.

Inspector Goh Chee Meng (SP11) testified that on 2 May 1999 at 10pm, he encountered SP6 and his party at the main gate of the Chaah Police Station. SP6 informed him that he had received information "sebuah kereta terbabas dan lelaki yang memandu kereta itu berkelakuan mencurigakan". He followed SP6 and his party. At the stated place, "saya melihat sebuah kereta putih dalam keadaan terbabas di tepi jalan menghala ke Yong Peng". He stopped his car behind the police land rover. SP6 alighted from the police land rover "dan terus berlari, anggota lain juga turun and berlari". He joined in. Whilst giving chase, he heard shouts "adalah pemandu kereta terbabas" coming from the direction of the food-stalls. Soon thereafter, SP6 apprehended a person. That person, who was the accused, was brought to the place of the stationary car. He instructed SP10 and Lance-Corporal Asnor to guard the accused. He and the rest of the police party then searched the car and surrounding area. In the midst of that search, SP5 came to the scene and spoke to SP6. That person indicated to a place near the car. SP6 informed him of what that person had said. He followed SP6 to the place indicated. SP6 informed him that there was a package. He immediately instructed SP8 to take a photograph of that package. He instructed SP6 to open the package. SP6 took out 21 compressed blocks of a plant material wrapped in translucent plastic from a plastic gunnysack. When that package was discovered, the accused was standing about 10 feet away, near the car. "Di situ, OKT boleh menyaksi apa yang berlaku di tempat bungkusan yang di jumpai." He suspected that those compressed blocks were cannabis, and he instructed that the accused be handcuffed. After SP6 had put back the compressed blocks into the package, and the package was retied, he instructed SP6 to take the package and contents to the area near the car and to guard that package. "Selepas itu saya teruskan buat pemeriksaan di sekitar kawasan berhampiran kereta terbabas dan juga di sekitar kawasan bungkusan di jumpai. Tapi saya tak jumpa apa-apa. Pemeriksaan itu ada lebih luas dari pemeriksaan pertama. Pemeriksaan kedua mengambil masa 10 hingga 15 minit. Tempat kereta terbabas dan kawasan sekitar dapat cahaya bulan and cahaya daripada warong dan lampu jalan. Tempat kereta terbabas dan sekitar samar-samar, tetapi boleh melihat dalam jarak 10 kaki, boleh lihat muka, memang boleh lihat bungkusan." All lights of the 5 or 6 food-stalls across the road were lit on the night in question. The car was slightly slanted in relation to the road, with the boot of the car closer to the stalls than the front of the car. The stalls

were about 30-40 feet from the car. During the 2nd search, one Halim bin Kadir arrived at the scene. Halim spoke to SP6. SP6 informed him that Halim came to help the accused. He instructed SP6 to arrest Halim and to search the car of Halim. A dog unit led by SP9 arrived at about 11pm. He instructed SP9 to search the car and surrounding area. "Pengesanan itu mengambil 2 jam. Ia meliputi kawasan yang luas. SP9 tak jumpa apa-apa"

During cross-examination, SP11 related that SP8 also followed him and SP6 to the place indicated. When he instructed SP8 to photograph the package, he did not know what was inside the package. The initial search had gone on for about 5-10 minutes when SP6 informed him that the package was on top of the embankment. Under re-examination SP11 testified that he did not know whether the shouts came from one or more persons.

The investigation officer, Inspector Zawahir bin Yaacob (SP12) testified that at on 3 May 1999 at 3am, he received a telephone call on the arrest of the accused. Later, at 4am at the Chaah Police Station, SP6 handed the accused and Halim bin Kadir to him. SP6 also handed to him a blue gunnysack and its contents, and other things taken into possession. In that gunnysack were 21 compressed blocks of a plant material wrapped in translucent plastic. He weighed each of those compressed blocks. The total gross weight of those 21 compressed blocks was 19,604 grams. On 3 May 1999, he forwarded the gunnysack and contents to Police Superintendent Alias (SP4) for fingerprint dusting. On 4 May 1999, SP8 brought him to the scene. There, he found skid marks. Nearby were food-stalls. There was an earth embankment about 1 meter high. The food-stalls were at a distance of about 15 meters. There was a telephone booth in front of the food-stalls. The streetlights near the food-stalls were at a distance of 30 meters and 100 meters. On 5 May 1999, SP4 returned the gunnysack and contents to him. On 6 May 1999, he delivered the gunnysack and contents to the government chemist for analysis. On 11 December 1999, the government chemist returned the gunnysack and contents to him. On the same day he handed the gunnysack and contents to the storekeeper (SP1). On 8 June 1999, Halim was released. On 4 May 1999, he found that the boot light of WBB 6888 was functioning.

Under cross-examination, SP12 testified that he was at scene on only one occasion, and that it was during daylight hours. All distances stated were from measurements taken. Under re-examination SP12 testified that at the scene he could see the food-stalls.

Earlier, Mohamad bin Kassim (SP2), the Head of Administration of the Road Transport Department Segamat testified that the registered owner of WBB 6888 on 4 May 1999 and before was one Johar bin Mustapha, the holder of identity card number 6901103524, and Ahmad bin Hussain (SP3), a government chemist, testified that he analysed the 21 compressed blocks of plant material and found that it contained 19,152 grams of cannabis within the meaning of the Dangerous Drugs Act, and Superintendent Alias bin Haji Mohd. Amin (SP4) testified that the fingerprints on 4 of the 21 blocks were not sufficient for comparison.

At the close of the prosecution case, Miss Latifah bte Ariffin for the accused submitted that to invoke s. 37(da) there must be proof of actual possession. There was no actual possession. The evidence of SP5 must be doubted. The trees near the food-stalls obstructed the light reaching the place in question. It was dark, and the evidence of SP5 could not be believed. SP11 testified that at the place in question he could only see the face of a person within 10 feet. SP5 could not have seen a package being removed and thrown. SP5 could not have seen the package being thrown to the right side of the car. Given the weight of the package and contents, it was not possible to throw it from the boot to the embankment. SP5 did not testify that the accused took out and then threw the package. SP9 and his dog unit failed to find anything incriminating in the car. Dogs were used, but there was no evidence of the odour of cannabis in the boot. If cannabis had been inside the boot, the odour of cannabis should be present, and the package could be traced to the boot. The drugs were found in an open place. SP12 agreed that there was a footpath near the embankment. Was SP5 the person who telephoned the police and spoke to SP6? The friends of SP5 were not named and they were not called as witnesses and offered for cross-examination. Section 37(da) is a rebuttable presumption. If the prosecution evidence does not show that the accused had knowledge of the nature of the drugs then there was no possession. Sections 37(d) and 37(da) must be read disjunctively. Some witnesses said that the accused berlari while other said that the accused berlari-lari anak. That is a material contradiction. If the accused knew that it was drugs, why would he wait near the car? Except that he ran, there was no evidence of guilty knowledge. There must be a nexus between the conduct of the accused and the offence. Mere knowledge does not prove possession. SP10 testified that the accused whilst under police guard did not attempt to run away. There is no evidence of the weight of the samples analysed. In *Loo Kia Ming v. PP* [2000] 3 CLJ 653, the Court of Appeal held that 10% must be analysed. Here, it was not stated that 10% was analysed, just that 32 samples (it fact it was 64 samples) from each compressed block were used for the 3rd and 4th tests. Defence could only be called for an offence under s. 39A(2). There is no *prima*

facie case. The accused was not informed of the reason for his arrest. Article 5(3) of the Federal Constitution was offended. The prosecution has failed to prove the ingredients of possession under s. 37(d) and the ingredients under s. 37(da). It could not be presumed that the drugs found near the car were under the custody or control of the accused.

The learned DPP, Haslinda bte Abu Bakar, submitted that the accused was found in actual possession. The accused was the sole occupant of the car registered in his name. SP5 testified that the accused appeared nervous and refused help. The accused drove away those who came to help him. After SP5 had departed, the accused threw a blue bundle from the car. The accused ran away when the police arrived at the scene. There was no reason for the accused to run, if he was not guilty. There is no evidence consistent with innocence. The conduct of the accused is consistent with guilt. The throwing of the package is consistent with guilt. There is no reason to doubt SP5. SP5 pointed correctly to the place where drugs were found. Therefore, SP5 must have seen the accused throwing the package. Evidence was led that the police received information that someone had thrown out a package from a car. All events happened just about 35 feet in front of SP5. There is no reason to doubt what SP5 said he had witnessed. The light was adequate. The boot of the car was facing the stalls. Light from the food-stalls and streetlights was sufficient for SP5 to see what was unfolding before him. The boot light lit up when the boot was opened. Therefore, SP5 could not have not seen a blue package being taken out and then thrown by the accused. SP5 was not discredited. SP5's evidence was not challenged. That the scene was illuminated by streetlights and by stall lights was supported by all witnesses at the scene. The photographs show that the trees would not have obstructed the light from illuminating the area of the stationary car. The boot was closer to the food-stalls, and what unfolded at the boot was in full view of SP5. The fact that SP5 could point out the direction in which the package was thrown showed that SP5 was a truthful witness. There might have been a path near the embankment, but the accused was the only person at the place in question. Dogs were used to search the area. Nothing else was found. Section 114(g) is not applicable. There was no withholding of evidence. SP5 was the principal witness. The others were not important. There is no gap in the prosecution case. In *K Saravanan v. PP* [2002] 4 CLJ 144, the Court of Appeal held that an adverse inference cannot be raised merely because a witness was not called and was not offered. SP5 was the only important witness. The others had not played an active part and were not important. SP5's evidence was never challenged. SP5's evidence remains intact. There is no material contradiction. Berlari and berlari-lari anak is not any different. There was a nexus between the accused and the drugs. The accused remained at the place until arrival of the police. The accused

remained at the place as not to abandon the drugs. The accused had knowledge of the drugs thrown out of the car. By remaining close to the car, the accused was in possession of the drugs (DPP referred to *Leow Nghee Lim v. R* [1956] MLJ 28). The accused was transporting. The definition of trafficking includes transporting. Regardless of the amount, the accused was trafficking. The prosecution need not rely on s. 37(j). The wrappings of the compressed blocks could not be receptacles within the meaning of s. 37(j). *Loo Kia Ming* must be distinguished. Section 37(j) refers to 10% of packages and not 10% of weight (DPP referred to *Au Ah Lin v. PP* [1963] MLJ 365). *Leong Boon Huat* did not say that 10% of the weight must be analysed.

The short reply of Miss Latifah was that *Loo Kia Ming*, being a recent decision, must prevail over the earlier authorities.

Section 180(i) of the Criminal Procedure Code presently provides that "when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused". In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, the Court of Appeal thus set out the meaning of '*prima facie* case' and the approach to be adopted at the close of the prosecution case:

> In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215, Augustine Paul J made the following observation which has since received approval sub silentio from the Federal Court (see [2002] 3 CLJ 457): A *prima facie* case arises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.
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> In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.
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> …

In *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209, Vincent Ng J expressed his view on the amendment to section: Thus, to me, maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led rather than the persuasive burden in terms of qualitative degree of proof. What then constitutes a '*prima facie* case'? '*Prima facie'* means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the Oxford Companion of Law (p. 987), which has it as:

> A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, **but is not conclusive.**' It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected. (emphasis added.)

The same learned judge in *Public Prosecutor v. Saare Hama & Anor* [2001] 4 CLJ 475 said: In my view the prosecution could be ruled to have 'made out a *prima facie* case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and to reiterate there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance, this is what Gordon Smith Ag JA held in *PP v. Chin Yoke* [1940] MLJ 47.

Although we might have expressed the test in different words, we agree with the formulation of the test in *Ong Cheng Heong* and *Saare Hama*. In our judgment, these two cases accurately set out the approach that is to be adopted under ss. 173(f) and 180 of the CPC at the conclusion of the prosecution's case.

Lastly, in *Public Prosecutor v. Mohan Singh* [1999] 4 CLJ 620; *Pendakwa Raya v. Mohan Singh a [sol] l Lachman Singh* [1999] MLJU 218, Wahab Patail J expressed his view upon the approach to be taken by a court when deciding whether the prosecution had made out a case under s. 180 of the

> CPC. He said: I conclude then that the prosecution must be in a position to say: (a) at the end of the prosecution case, that on the basis of the evidence it has advanced, and tested by cross-examination, it has advanced evidence beyond reasonable doubt in respect of all the elements of the charge; and (b) at the end of the trial, and based upon an evaluation of the whole of the evidence, that the defence has not raised any reasonable doubts by the evidence that the latter has adduced. Keeping in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a *prima facie* case. It goes without saying that an evaluation of whether the prosecution has discharged the burden of proof beyond reasonable doubt requires a full or maximum evaluation of the evidence in the sense of evaluating the evidence before the Court thoroughly.
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> If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

The pronouncement by the Court of Appeal in *Looi Kow Chai* is that at the close of the prosecution case the court must subject the prosecution evidence to a maximum evaluation, albeit a maximum evaluation as formulated in *Ong Cheng Heong* and *Saare Hama*. The other pronouncement by the Court of Appeal in *Looi Kow Chai* is that the prosecution need not prove its case beyond a reasonable doubt at the intermediate stage.

The charge against the accused is that he was trafficking in cannabis, a dangerous drug. The first ingredient of the offence is trafficking (*PP v. Ahmad Rashdan bin Shamsher* [1994] 239 MLJU 1). 'Trafficking' is defined in s. 2 of the Act to include, "the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug." And if it is a case of possession, s. 37(da) of the Act provides, "any person who is found in possession of 200 grammes or more in weight of cannabis otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug". But this is not a case of mere possession, for if the testimony of SP5 is to be believed the accused was transporting what according to SP3 was a dangerous

drug. According to SP5, who undoubtedly was the principal witness for the prosecution, the accused was the driver of WBB 6888 and who removed a blue package from the boot of WBB 6888 and then flung the same to the right side of WBB 6888 after WBB 6888 had crushed into an earth embankment. And according to SP5 who was entirely corroborated by SP6, he pointed out to SP6 the direction in which the blue package was thrown. According to SP6, he proceeded in the direction pointed out to him by SP5 and then straightaway came across a blue plastic package containing 21 blocks of a compressed plant material, which plant material SP3 testified he analysed and found to contain 19,152 grams of cannabis within the meaning of the Dangerous Drugs Act. But the package in question could not be linked to the accused without the evidence of SP5. There would also be no question of there being a case against the accused if the evidence of SP5 is not capable of belief or is in doubt. Hence the evaluation of the prosecution evidence should begin with SP5's evidence.

Cut down to its bare essentials, SP5 testified that the accused was the driver of WBB 6888 proceeding towards Yong Peng that then went gone off the road and crushed into an earth embankment at Desa Temu Jodoh, Chaah, Johor, and that thereafter the accused removed a blue package from the boot of the stationary WBB 6888 and flung the same to the right side of WBB 6888. SP5 testified that he witnessed both events whilst he was seated at a distance of about 35 feet from the stationary WBB 6888, at one of the roadside food-stalls directly opposite the stationary WBB 6888. As for the accuracy of that stated distance, SP8 testified that the distance between the stationary car and food-stalls was about 30 feet, SP10 testified "Jarak warong ke tempat kejadian adalah lebih kurang 35 kaki", SP11 testified that it between 30-40 feet, while SP12 testified that he measured and found that the distance between the scene and food-stalls to be about 15 metres. Hence, SP5 would only have been at a distance of about 50 feet from the stationary WBB 6888 when he said he witnessed the accused removing a blue package from the boot of WBB 6888 and then flinging the same to the right side of WBB 6888. And reasonably, at a distance of about 50 feet, SP5 would not have not been able to see and make out what was transpiring before him, for both stationary car and accused at a distance of about 50 feet would not have been visually too small for SP5 to observe with sufficient clarity. Rather at a distance of about 50 feet, SP5 was more than close enough to the stationary car and accused to observe all that he said had taken in and about the boot of the stationary car. Also, the position of the stationary WBB 6888, in that it was not positioned parallel to the road but rather with the boot of the car being closer to the road than the front of the car, would also not have obstructed observation of the boot of the car. Indeed, given the position of the stationary WBB 6888 in relation to the

food-stalls across the road, the boot of WBB 6888 would have been in full view of SP5, for in between the stationary WBB 6888 and SP5 was just a road and open space. If indeed the accused had opened the boot and removed a blue package from the boot, and flung it to the side of the stationary car, then all those alleged acts of the accused would have in full view of SP5. There is definitely no reason for to say that by reason of any obstruction or distance that SP5 could not have witnessed those alleged acts of the accused.

Perhaps it could be argued, as indeed it was argued by the defence, that at 9 o'clock at night it would have been too dark then for anyone at the food-stalls to see across the road. In fact, SP5 testified that it was dark at about the place of the stationary car. But that is not to say that SP5 agreed that it was too dark for him to see the act of the accused, for SP5 testified that there was light from streetlights and food-stalls, and that the light from those sources was sufficient for him to observe the act of the accused. And SP5 was not the only witness who testified that the area in and about the stationary car was illuminated by the light from across the road. SP6 testified that the area about the boot of the stationary car was illuminated by light from the food-stalls, and that it was bright in the vicinity of the car. SP8 testified that the lights of the food-stalls were lit. SP9 testified "Saya buat pemeriksaan meliputi kawasan 50 meter sekeliling kereta. Saya mengambil masa 20 minit untuk menjalankan pemeriksaan. Saya tidak guna lampu suluh, sebab ia agak cahaya". SP10 testified, "Semasa saya berada di tempat kejadian saya dapati tempat itu ada cahaya yang datang dari lampu jalan dan lampu-lampu warong. Ada 4-5 warong dan semua beroperasi …". SP11 testified "Tempat kereta terbabas dan kawasan sekitar dapat cahaya bulan and cahaya daripada warong dan lampu jalan. Tempat kereta terbabas dan sekitar samar-samar, tetapi boleh melihat dalam jarak 10 kaki, boleh lihat muka, memang boleh lihat bungkusan". Admittedly SP11 testified that it was dark and that he could only see the face of a person within 10 feet. But SP11 did not say that he could see only within 10 feet. In fact, SP9 testified that he did not use any torchlight during his search of the surrounding area, as it was "agak cahaya". And SP9's evidence that it was "agak cahaya" was not challenged, for SP9 was not cross-examined. The defence argued that it was dark and SP5 could not have seen a package being removed and thrown. But the evidence was that it was dark but yet bright enough to see. The fact of the matter is that one could see under poor light. No one said that it was pitch dark. And reasonably it would have to be really pitch black as not to be able to see a car and a human being just about 50 feet away. It was not total darkness. The evidence was that there was light from the streetlights and food-stalls. The evidence of SP5 was that the light of the boot of the car lit up when it was opened – "Saya nampak bungkusan dikeluarkan sebab ada cahaya lampu dari boot kereta, sewaktu boot dibuka".

The evidence of SP12 was that he found that the boot light of WBB 6888 was functioning on 4 May 1999. In short, the unmistakable evidence was that darkness did not shroud the alleged acts of the accused. SP5 could have witnessed those alleged acts of the accused. That it was dark is no reason to disbelieve SP5.

Is there any other reason to disbelieve the evidence of SP5? The maxim is *"testimonia ponderanda sunt, non numeranda",* which means that testimonies are to be weighed and not numbered. "This rule imports that more regard is to be paid to the character of the evidence adduced in support of a case than to the number merely of the witnesses who give it; for the value of two respectable and credible witnesses is more value than that of a dozen witnesses of notoriously abandoned and profligate character" (*Trayner's Latin Maxims* 4th edn). "The number of witnesses is not to the point. Suppose perjury was clearly proved by two witnesses, it does not matter whether a dozen witnesses were called by the defendant to contradict the evidence, as the jury would be justified in rejecting the evidence of the dozen witnesses and accepting the evidence of the two. The rule of law is *testimonia ponderanda sunt, non numeranda,* and therefore in this case I am not concerned with the fact that there were more witnesses for the plaintiff than for the defendant" (*In the Matter of Seven Witnesses Sentenced Summarily for Perjury* [1906] 8 HKCU 1, per Sir John Carrington CJ). As said, SP5 was the only witness who could link the accused to the package. But everything says that SP5 was a credible witness. Everything said by SP5 was corroborated and or borne out by other evidence. SP5 testified that the light of the boot of the car lit up when the boot was opened. And SP12 confirmed that the boot light lit up when he opened the boot on 4 May 1999. SP5 testified, "Saya lihat OKT ambil satu bungkusan dan buang bungkusan itu di sebelah kereta. Bungkusan itu agak besar. Bungkusan itu berwarna biru kehitaman berdasarkan cahaya pada malam itu. OKT campak bungkusan ke sebelah tempat pemandu." And the package recovered is large and blue, which colour in poor light would take on a darker hue. But it is the almost instantaneous discovery of the package at the location indicated by SP5 that gave the most credence to SP5. If SP5 had not witnessed the package being thrown, and thrown at that to the right front side of the car, then SP5 would not have been able to point out with such accuracy to SP6 "di mana OKT buang barang itu". SP6 testified that the police party had searched the area for about 10-15 minutes prior to the information of SP5. But according to SP6, the package was detected on top of the earth embankment near the stationary car within 1 minute after SP5 had pointed out to SP6 the direction in which the package was thrown. SP8 testified that the package was immediately detected after a member of the public had spoken to SP6 and indicated a certain direction to SP6. According to SP11, the police party had

searched the area for about 5-10 minutes prior to the information given by a member of the public, but subsequent to the information provided, "tidak perlu mencari bungkusan, pergi dan jumpa". In effect, all police witnesses deposed that it was a less than successful search prior to the information of SP5, and that the package was discovered in consequence of information given by SP5. Therefore quite clearly, the discovery of the package was a consequence of the SP5's information. And the discovery of the package also confirmed that information must have been given by SP5 (for an analogy, see *Pang Chee Meng v. PP* [1992] 2 SCR 1), and that the information would have been that a package was thrown in the direction of the right front side of the stationary car. But SP5 could not have been so accurate with his information if he had not seen the package being thrown. So, SP5 must have seen a package being thrown, and thrown by the accused (which was the consistent story of SP5 to the police and to the court), or else SP5 could not have been able to provide SP6 with what would prove to be spot on information on the whereabouts of the package.

Of course, SP5 only testified that he saw the accused taking out a blue package and then throwing the same to the right front side of the stationary car. The blue package containing 21 compressed blocks of plant material was found on top of the embankment near the right front side of the stationary car. But was that blue package on top of the embankment the same blue package thrown by the accused? It ought be borne in mind that no other blue package or other article or thing was found near and or within the vicinity of the stationary car. SP9 who had canine help testified, "Ada buat pemeriksaan di luar and di dalam kereta, Tidak jumpai apa-apa barang salah. Saya buat pemeriksaan meliputi kawasan 50 meter sekeliling kereta. Saya mengambil masa 20 minit untuk menjalankan pemeriksaan". SP10 affirmed that the dog unit had searched the stationary car and the surrounding area. SP11 testified that SP9 had searched over a wide area but did not uncover anything – "Ia meliputi kawasan yang luas. SP9 tak jumpa apa-apa". In other words, despite an extensive search over a wide area, only the blue package produced in court was uncovered. The only article or thing near and or in the vicinity of the stationary car was the blue package containing 21 blocks of compressed plant material produced in court. But that should not be the case if the blue package thrown by the accused was not the same blue package containing 21 blocks of compressed plant material produced in court. If the accused had thrown some other blue package, then it would surely have been uncovered in the search of the area. But the fact is that the blue package containing 21 blocks of compressed plant material produced in court was the only article or thing found near and or in the vicinity of the stationary car. Now to get to the point, it must pan out, since only one blue package was found near the stationary car, that that blue

package was the very same blue package seen by SP5 to have been taken out of the boot and then thrown to the right front side of the stationary car. That is the inescapable and reasonable conclusion in the light of the established facts and circumstances.

As for the contents of those 21 compressed blocks of plant material, the government chemist (SP3) testified that he individually weighed and analysed each of the 21 blocks of compressed plant material marked as A1 to A21, which were handed to him by SP12. "Untuk setiap 21 blok bahan tumbuhan saya jalankan ujian dan prosedur serupa, saya lakukan 4 ujian (i) visual observation, (i) di bawah microscope, (iii) Duquenois-Levine Test (DLT) (iv) Thin Layer Chromatography Test (TLC)". The process of his analysis was given as follows. "Bila saya meneruskan analisa saya keluarkan satu dan timbangnya. Saya keluarkan satu per satu sahaja. Setelah siap analisa barulahlah saya keluarkan blok kedua. Saya lakukan proses yang sama. Setelah timbang A1 dan dapat berat bersih saya jalankan 4 ujian" (the net weight of each of those 21 blocks of compressed plant material was given by SP3 – see p. 12 of the notes of evidence). "Untuk visual observation saya telah memecah blok tersebut dan melihat samada terdapat benda asing. Saya dapati bahan adalah serupa, tidak ada benda asing. Saya lakukan observation terhadap keseluruhan bahan tumbuhan. Melalui visual observation bahan ada ciri serupa, ciri cannabis, dari bentuk daun dan batang. Selepas itu saya melihat secara microscope. Saya dapati bahan tumbuhan itu mempunyai ciri-ciri tumbuhan jenis cannabis, seperti terdapatnya cystolith hairs, glandular trichome. Juga jenis berbentuk gumpulan yang terlekat pada tumbuhan. Saya jalankan ujian keseluruhan tumbuhan. Cystolith hair, glandular trichome dan resin ada ciri kepada cannabis, dan cannabis sahaja. Ujian Duquenois-Levine adalah untuk memastikan samada resin mengandungi cannabinoid atau tidak. Cannabinoid adalah bahan aktif cannabis. Cannabinoid tidak didapati oleh tumbuhan lain. Untuk ujian 3 dan 4, dari satu blok saya ambil 32 sample yang berlainan. Tiap-tiap contoh beratnya lebih kurang 1 gram. Saya tidak timbang semula. In my experience, berat contoh yang saya ambil adalah cukup untuk menjalankan ujian 3 dan 4. Untuk jujian 3 dan 4, tidak perlu saya mengambil sample dengan berat 10% dari bahan. 32 sample dari satu blok adalah cukup untuk memberi gambaran yang bahan mengandungi cannabinoid. Dengan ujian 3 saya dapati setiap 32 sample mengandungi cannabinoid. Dengan ujian 4 saya ambil 32 sample lain dan saya dapati setiap 32 sample mengandungi tetrahydrocannabinoid iaitu sejenis cannabinoid. Dengan 4 ujian yang saya jalankan atas 21 blok dengan menguna proses yang sama, saya dapati bahan tumbuhan adalah cannabis seperti yang ditarifkan di dalam s. 2 DDA. Keempat ujian adalah mencukupi untuk memastikan kesemua 21 blok adalah cannabis ... Saya tidak mengguna cara s. 37(j). Saya guna cara yang dipakai oleh Jabatan

Kimia Malaysia untuk semua kes cannabis. Saya guna method yang dikeluarkan oleh United Nations Recommended Methods. Methods yang sama adalah sesuai untuk jumlah dadah yang terlibat dalam kes ini" (emphasis is mine). In other words, it was the testimony of the chemist that there was a visual observation and a microscopic examination of the entire 21 blocks of plant material after it had been loosened up, and that from such visual observation and microscopic examination were seen systolic hairs and glandular trichome on all plant material. It was the testimony of the chemist that cystolith hairs and glandular trichome are the characteristics of cannabis and cannabis alone. It was the testimony of the chemist that a total of 64 samples were taken from each block of plant material to perform the Duquenois-Levine and Thin Layer Chromatography Tests (32 samples for DLT and another 32 samples for TLC). All except that there was no evidence that 10% of the total weight of the 21 blocks was used for the Duquenois-Levine and Thin Layer Chromatography Tests. And in *Loo Kia Ming v. PP* [2000] 3 CLJ 653, it was held by the Court of Appeal that by virtue of s. 37(j) of the Act, it is incumbent for a chemist to test a minimum of 10% of the drug. But *Loo Kia Ming* is not the one and only Court of Appeal authority on the quantity of drugs to be chemically tested by a chemist. In *Wan Mohd Kamil bin Wan Mohamad v. PP* [2003] 1 CLJ 665, where the evidence of the chemist was also attacked, the Court of Appeal held that the chemist, by physical examination and microscopic examination of the entire plant material and by Duquenois-Levine and Thin Layer Chromatography tests performed on 32 samples taken from the bulk of the plant material, "had carried out a detailed analysis of the plant material" and that "the evidence given by the chemist cannot be faulted". PS Gill JCA said as follows:

> At this hearing of the appeal before us, counsel for the appellant raised a number of issues. However, two pertinent issues worthy of consideration are, firstly, that the trial judge was wrong in accepting the evidence of the chemist PW4, and secondly, that the trial judge was wrong in invoking, the presumption of trafficking upon a presumption of possession of ganja, thereby seriously misdirecting himself in law.
>
> In respect of the issue of the evidence of the chemist, he stated that he conducted a separate analysis of the content of the packets marked as 'A' and 'A1' which were handed to him by Ketua Inspektor Abdul Razak bin Hassan. In his evidence, he stated:
>
> I conducted separate analysis on the two packets, ie 'A' and 'A1'. For packet 'A' what I did were as follows:

(1) I obtained the net weight of the block of the compressed plant material. I then loosen up completely the compressed plant material to carry out the physical examination on all the plant material. I found all the plant material to belong to one type similar to cannabis. No foreign material in it.

(2) I then carried out microscopic examination on all the plant material and found all of them to bear the characteristic features of cannabis. They are:

(ii) cystolith hairs;

(ii) simple hairs;

(iii) grandular hairs; and

(iv) abundance resin at their natural state.

My conclusion after the two examinations is that the entire plant is from genus cannabis.

I, after that, took 32 random samples from the bulk of the plant material to perform the Duquenois-Levine (DLT) Test and Thin Layer Chomotrophy (TLC). The purpose of the two tests is to detect the presence of cannabinoid in the resin that I observed in all the plant material. From the two tests that I did, I concluded that cannabinoid were present. Therefore I conclude that all the plant material from the compressed in 'A', is cannabis as defined under s. 2 of the (Dangerous Drugs Act 1952) DDA 1952.

Similar analysis was carried out from the compressed block plant material marked 'A1'. I obtained the same result that they were cannabis as defined under s. 2 of the DDA 1952.

Cannabinoid are the active ingredient of cannabis. After the physical and microscopic examination, I have concluded that all the plant material were of genus cannabis. There was only one type of plant material. So if any part of the plant material is found to be cannabis as defined under s. 2 of the DDA, the entire bulk must be the same. Therefore there is no necessity to subject the entire plant materials for the DLT and TLC test.

We observed that the chemist took representative samples at random from the different parts of the impugned drugs in packages 'A and 'A1' for analysis. We are of the view that the facts in the case of *Leong Bon Huat v. Public Prosecutor* [1993] 3 MLJ 11 referred to us by appellant's counsel are distinguishable, as in that case, the chemist stated that out of the total amount of cannabis weighing 793.85g, he merely took representative samples of 79.30g for analysis, leaving the balance of the cannabis not analysed.

It is clear that the chemist carried out a detailed analysis of the plant contained in the two packets and he testified positively that the result of his test showed that the plant material examined by him was cannabis as defined under s. 2 of the Act.

It is our considered view, the evidence given by the chemist was satisfactory and cannot be faulted. In the premise, we hold that the appeal on this issue is without merit.

Indeed, while it was said in *Leong Bon Huat* that there should be chemical tests on "adequate quantities of plant material", it was also said by the Supreme Court per Edgar Joseph Jr. SCJ that "what would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the tests were adequate, having regard to the total weight of the plant material, for the reason stated". Attention should also be called to the fact that although the chemist in *Leong Bon Huat* did say that he conducted a physical examination of the plant material, he failed however to mention the result of his physical examination (see *Leong Bon Huat*, 14, 15). But there was no such malady in the evidence of the chemist in the instant case (for an analogy, see *Roslim bin Harun v. PP* [1994] 2 CLJ 486). SP3 testified, "Untuk visual observation saya telah memecah blok tersebut dan melihat samada terdapat benda asing. Saya dapati bahan adalah serupa, tidak ada benda asing. **Saya lakukan observation terhadap keseluruhan bahan tumbuhan**. Melalui visual observation bahan ada ciri serupa, ciri cannabis, dari bentuk daun dan batang. Selepas itu saya melihat secara microscope. Saya dapati bahan tumbuhan itu mempunyai ciri-ciri tumbuhan jenis cannabis, seperti terdapatnya systolic hairs, glandular trichome. Juga jenis berbentuk gumpulan yang terlekat pada tumbuhan. **Saya jalankan ujian keseluruhan tumbuhan**. Cystolith hair, glandular trichome dan resin ada ciri kepada cannabis, dan cannabis sahaja" (emphasis added). What is more, SP3 had used 64 samples from each block to perform the chemical tests. SP3 had not used the method stated in s. 37(j) of the Act, which method in any event was not available to SP3, as the clear plastic wrappings on the 21 blocks were not 'containers' which is the meaning of 'receptacles' in the context of s. 37(j) when read as a whole. The blue plastic gunnysack could be a receptacle. But even if so, there was only one receptacle, and s. 37(j) which applies only where there are a number of receptacles, was yet not applicable.

And even if s. 37(j) was applicable, it is not yet settled that 10% of the weight must be tested. In *Au Ah Lin v. PP* [1963] 1 MLJ 365, the second ground of appeal was that there was non-compliance with the provisions of s. 61 of the Excise Act 1961 which read as follows:

> When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, and the Court shall presume that the goods contained, in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

The opinion of the Federal Court consisting of a most formidable panel of judges, Thompson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), was categorical:

> In our view, that ground of appeal is based on a misapprehension. It is quite clear that the Revenue Officers took possession of either all or part of the contents of every container alleged to contain excisable liquor. The amount of the sample is not in evidence in every instance.
>
> In our view section 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words "ten per centum" refer to the packages, not to the contents of each package.

Au Ah Lin concerned a provision under the Excise Act 1961 but in spite of that was applied in prosecutions under the Customs Act 1967 (see *Tan Khoon Eng v. PP* [1992] 2 MLJ 132, and *PP v. Cheng Meng Bong & Ors* [1966] 1 MLJ 237) and under the Dangerous Drugs Act 1952 (see *PP v. Lee Beng Siang* [1992] 2 MLJ 120). In particular, in *Teoh Hoe Chye v. PP*, *Yeap Teong Tean v. PP* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386, which concerned a drug trafficking offence and where the evidence of the chemist was questioned, it was held at first instance by Mohamed Dzaiddin J (as he then was) as follows:

> Lastly, on the question of the unsatisfactory evidence of the Chemist, PW1, I must reiterate that I accepted his evidence. In *Au Ah Lin v. Public Prosecutor* [1963] MLJ 365 Thomson LP held that the kind of provision with which we were dealing here did not require that samples be taken from the contents of every package or container in question. There was also no requirement of the taking of any particular quantity and that the words "ten percentum" referred to the package and not to the contents of each package.

Unfortunately, that astute observation of Mohamed Dzaiddin J was not taken up in the appeal, and was overlooked in the appeal.

The contrary opinion was expressed in *PP v. Tan Ann Chye* [2003] 5 MLJ 1, and in *PP v. Rosman bin Ismail* [2003] 5 CLJ 139, where *Loo Kia Meng* was followed. But *Loo Kia Meng* was not followed in *PP v. Chow Kam Meng* [2001] 386 MLJU 1, where it was held by Abdul Wahab Patail J that "Section 37(j) clearly requires not 10% of the weight of the plant material in each of the slabs wrapped in plastic to be used up as samples, but to 10% of the number of slabs" and that *Loo Kia Meng* which had not considered the Supreme Court decision in *Roslim bin Harun v. PP* [1994] 2 CLJ 486 SC and "is not good authority". All the same, as said, s. 37(j) was not applicable. And even if s. 37(j) was applicable, *Loo Kia Meng* is far from being the only superior authority on the issue. For apart from Wan Mohd Kamil, there is *K Saravanan v. PP* [2002] 4 CLJ 144, where it was held by the Court of Appeal per Mohd Noor Ahmad JCA that the chemist who tested random 32 samples had clearly complied with the provisions of s. 37(j). This court is satisfied that SP3 had used analytical methods approved most recently by the Court of Appeal in Wan Mohd Kamil. In every respect, SP3 had carried out all analytical tests that in the considered view of the Court of Appeal in Wan Mohd Kamil amount to a detailed analysis of the plant material. The evidence of SP3 could not be faulted. Cross-examination had not cast any doubt on the weight of cannabis stated by SP3, who as was earlier noted had used twice over the number of samples used in Wan Mohd Kamil. There is no doubt whatsoever that the said 21 blocks of plant material examined by SP3 who positively testified so, were indeed cannabis as defined in s. 2 of the Act.

Prior to it being taken out of the boot and thrown to the right front side of the stationary car, that blue package containing 21 blocks of cannabis was in the boot of the same said car then being driven by the accused on the main road from Segamat to Yong Peng. 'Trafficking' is defined in s. 2 of the Act to include, "the doing of any of the following acts, that is to say … transporting … any dangerous drug." But not all transportation of a dangerous drug amount to trafficking. Where two joint owners purchase a quantity of a narcotic for their own use and are jointly in possession of it while transporting it in a vehicle, the owner/driver of the car cannot be found guilty of possessing it for the purposes of trafficking (*Regina v. Harrington and Scosky* [1964] 1 CCC 189). As the owner/driver does not further or advance the distribution of the drug to other persons other than the joint owner of the drug who was present with him in the car and also in physical possession of it, he has not "trafficked" in the narcotic (*Regina v. Lorne Binkley* 69 CCC (2d) 169).

That the mere act of moving controlled drugs does not of itself amount to trafficking within the meaning of s. 2 of the Act was clearly stated by Lord Diplock in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 68:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s. 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s. 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transport them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport', to which attention has been drawn, attracts the maxim noscitur a sociis. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s. 3 with its draconian penalties is directed.
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> The Court of Appeal of British Columbia in *R v. McDonald* [1963] 43 WWR 337 at p. 342, interpreted 'transport' in the virtually identical definition of 'traffic' in the Canadian Narcotic Control Act 1960-61,as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R v. Greene* [1977] 74 DLR 3d 354. Acceptance of it is implicit in the *ratio decidendi* of the Court of Criminal Appeal of Singapore in *Wong Kee Chin.*

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorized by the Act or Regulations, involves an offence of having the drug in one's possession under s. 6 but does not amount to the offence of trafficking under s. 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s. 10 of the Drugs Act and s. 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under s. 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s. 29 and the Second Sch.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss. 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in s. 15 of the Drugs Act.

> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s. 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s. 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.
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> Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s. 3.

That judgment of Lord Diplock was recently looked at by the Court of Appeal. In *Muhamad Safarudin bin Baba & Anor v. PP* [2002] 4 CLJ 210, Mohd Noor Ahmad JCA observed:

> From the judgment, it is manifestly clear that the factors such as the drug was for personal consumption, the type of 'transporting' or 'carrying', the quantity involved, whether or not the accused was an addict, would be relevant to rebut the presumption under s. 15(c) of the Singapore Act that the accused had the said controlled drug in his possession for the purpose of trafficking; likewise in relation to the presumption of trafficking under s. 37(da) of the Act by reason of being found in actual possession of the said drug.

And in *Mohamad Yazri bin Minhat v. PP* [2003] 2 CLJ 65, where the judgment of Lord Diplock was quoted in extenso, Gopal Sri Ram JCA thus pronounced:

> We have quoted at length from Lord Diplock's judgment to demonstrate the value of the direct evidence led before the learned judge and now in the record of appeal provided to us.
>
> To summarize, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

Ong Ah Chuan was not referred to in *Chow Kok Keong v. PP* [1998] 2 CLJ 469. But it did not matter, as the Federal Court per Edgar Joseph Jr. FJ needed no precedent for to say that the offence of trafficking involves something more than passive possession and self-administration:

> To revert to the grounds of judgment, in considering and rejecting the defence of the appellants, the judge had, as we have said, relied on the definition of trafficking in s. 2 of the Act set out earlier herein.
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> And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160, where the court briefly considered the effect of the definition of trafficking aforesaid and, in particular the court observed:
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> > The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffick' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession and self-administration of the drug. See *Ong Ah Chuan v. PP* [1981] 1 MLJ 64.
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> The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v. PP* [1994] 2 CLJ 593, the Supreme Court followed *Cohen*.
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> In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s. 39B of our Act. Having considered this point afresh, we preferred the views expressed in Cohen and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as over simplistic.

There are differences in the definition of 'trafficking' in the Malaysian and Singapore Acts. But both the Malaysian and Singapore courts agree that whether transporting a quantity of drugs from one point to another is trafficking depends on the facts and circumstances of the given case. It would appear so, for it was held by the Singapore Court of Appeal in *PP v. Lau Chi Sing* [1988] 1 MLJ 383, following *Ong Ah Chuan*, that "the test for determining whether an act of transporting drugs from one point to another falls within

the meaning of "transport" in s. 2 is the purpose for which the drugs are being transported. If the drugs are transported for the purpose of distributing or giving them to one or more persons, known or in contemplation, at the intended destination then that act of transporting falls within the statutory meaning and is an act of trafficking; if, on the other hand, the purpose is for the transporter's own consumption, such act of transporting is not trafficking within the meaning of s. 2", and that "so long as the drugs are transported for the purpose of distribution, it is immaterial whether the intended distribution takes place here, or abroad. Logically, it must follow that such a mover commits the offence immediately after he has begun his journey of moving the drugs, irrespective whether he reaches his destination or not; it is the act of transporting drugs for the purpose of distribution which is one of the evils against which s. 5 is directed". A similar view was expressed by the Singapore Court of Appeal in *Syed Feisal Yahya v. PP* [1992] 2 SLR 190, where it was that "Whether an act of conveyance of drugs amounts to trafficking by transportation depends on the purpose of the conveyance at the time of the conveyance. This purpose is not determined by reference to the intended use at the intended destination but by the ultimate intended use of the drugs. If the purpose is furthering or advancing distribution of the drugs, then the conveyance amounts to transporting under the Act. However, if they are solely for the use of the transporter and it is never intended that possession is to be parted with, whether at the intended destination or otherwise, then the conveyance does not amount to trafficking. The correct test is the state of mind of the transporter at the time he was transporting the drugs", and in *Cheng Heng Lee & Anor v. PP* [1999] 1 SLR 504, where it was held that "Trafficking in a controlled drug by transporting the drug was made out if a person transferred a controlled drug from one place to another for the purpose of ultimate distribution and not for personal consumption. It is immaterial that he did not part with or transfer possession of the drug to another person".

Of course, it goes without saying that the act of transporting is to be considered only as such, if it is a conscious act (for an analogy, see *Mohamad Radzi bin Abu Bakar v. PP* [2002] 3 CLJ 794). The accused must be transporting knowingly (for an analogy, see *PP v. Chan Ah Kow & Anor* [1988] 1 CLJ 821; [1988] 2 CLJ (Rep) 186. Suffice it to say, that proof of knowledge is often a matter of inference (for a detailed discussion on the proof of knowledge by drawing inferences, see *PP v. Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13), as was the case in *Mohamad Radzi bin Abu Bakar*, where the facts were that to intercept an approaching motorcycle, a customs officer went to the middle of the road and held up a stop sign which read 'Berhenti Kastam' ('Stop Custom'). The rider (the accused) of the motorcycle did not stop but instead made a turn and headed away in the opposite direction. At the same

time the pillion rider of the motorcycle jumped from the motorcycle and ran away. Both rider and pillion rider were eventually arrested. The accused was wearing a long sleeved jacket over a short-sleeved jacket. From the right inner pocket of the long sleeved jacket a package wrapped in Thai newspaper was taken out and another similarly wrapped package was taken from the left inner pocket. From the left and right pockets of the inner jacket were recovered similarly wrapped packages. All four packages recovered from the two jackets contained dry plant material which the government chemist analysed and found to be 'cannabis' as defined under the Act.

And what Mokhtar Sidin JCA had to say in his judgment is pertinent not only to 'inferences', but also to 'possession', 'direct evidence of possession', and 'direct evidence of trafficking'.

> The case in this appeal is not complicated and the facts establishing a *prima facie* are obvious. The learned judge had relied on s. 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of the cannabis, P4 and P5, one in the right and the other in the left inner pockets of the jacket the gross weight being about 180g ... Anyone wearing it would have felt the packages sticking against the chest and the jacket being weighed down by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192g … There cannot have been but a deliberate act on his part to have worn two jackets with packages and it would be an attack on common sense to say that he did not know the packages were packages of cannabis. In any event from the nature of the cross-examination of the witnesses there was no question put to the prosecution witnesses to show that the accused was not aware that he was carrying the four packages or that he was not aware that he was carrying cannabis ...
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> The other telling piece of evidence which has to be taken into account which shows that clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signalled to stop by a customs officer who held up a customs stop sign 'Berhenti Kastam' instead of stopping he turned around and headed in the opposite direction.
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> Thus, at the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature there was also positive evidence that he fell within the meaning of 'trafficking' as defined in s. 2 of the Act, which states:

In this Act, unless the context otherwise requires:

'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, **transporting, carrying,** sending, delivering, procuring, supplying, or distributing any dangerous drug. (emphasis added.)

There was no evidence to show the context to be otherwise that he was carrying and transporting, all the while knowing what he was doing – knowingly carrying the drugs on his person and riding on a motorcycle with it from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit cannabis. There was very strong *prima facie* evidence of trafficking in the dangerous drug.

Thus when the trial judge called upon the accused to make his defence on the charge of trafficking in the cannabis there was ample positive evidence for him to do so although he had invoked s. 37(1)(da) to presume that the accused was trafficking in the drug and the accused elected to make his defence on oath.

The evidence in the instant case clearly proved that the package containing the said 21 blocks of cannabis was in the boot of a car, that at or about the 132.5 km Johor Baru to Segamat Road, was travelling from the direction of Segamat towards the direction of Yong Peng, under the direction and control of the accused. The obvious question is whether the accused were aware that he was driving a car with a package containing cannabis in the boot. Obviously, the accused must be consciously moving drugs from one place to another, if he were aware that he was driving a car with a package containing drugs in the boot. "*Mens rea* … may be found in the general situation and overt acts of the accused. *Acta exteriora indicant interiora secreta"* (*Rex v. Container Materials Ltd*. et al 74 CCC 113 per Hope J). The evidence was that the accused drove away those persons who came to assist him. That conduct was strange, as a person involved in a motor accident does not ordinarily drive away even strangers, who come to render him assistance, even if he does not require their assistance. The accused might not have required the assistance of SP5 and friends. If that were the case, the normal conduct should be to turn down or decline the offer of assistance, but in the event not to eject SP5 and friends whose intention was not malevolent and whose presence at the scene was not any hindrance or was in the way of the accused. The evidence was that the accused ran from the scene at the moment that SP6 and SP8 alighted from

the police land rover. That conduct was also strange, as the accused was involved in only a minor road accident involving just him and his car, and given so there was really no reason for the accused to run from the scene, which might well be the case if the accused had injured others and as a consequence there might be reasonable apprehension on the part of the accused that he could be assaulted by a hostile crowd. It was a police land rover that had arrived at the scene, and the persons who alighted from the police land rover were policemen in police uniform. At a distance of about 50 feet, SP5 could see that the police had arrived at the scene. At a distance of about 10 feet (SP6 testified that the police land rover stopped at a distance of about 10 feet away from the accused who was then squatting near the stationary WBB 6888), the accused should be able to see that it was the police who had arrived at the scene. At a distance of about 10 feet, the accused should be able to see that the persons who were alighting from the police land rover were in police uniform and were the police. Prior to the arrival of police, the accused had remained at the scene. The evidence was that prior to the arrival of police, the accused had positioned himself near his stationary car. Prior to the arrival of the police, the accused had not left the scene. So what plausible reason was there for the accused to suddenly pick himself up from his squatting position and attempt to get away from the scene upon arrival of the police? What plausible reason was there for the accused to run away from the police party in pursuit? All told, that conduct of the accused was not consistent with innocence or with the conduct of one involved in only a minor and innocuous road accident. Rather, that conduct of the accused was consistent with guilty knowledge, and on the facts of the present case, of the immediate or nearby presence of thing or things incriminatory.

The overt acts of the accused also showed that the accused was aware that there that said package in the boot of the car he was driving, and that that package contained thing or things incriminatory. The evidence was that the accused opened the boot and then removed the said package. To begin with, the accused would have seen that package in the boot when he opened the boot of the car, otherwise the accused could not have removed the package from the boot. But more importantly, was the accused aware that there was that blue package before he opened the boot at the scene? The further overt act of the accused was to throw the package he had removed from the boot to the right front side of his car. SP5 testified that the overt acts aroused his suspicion. But what reasonably would have been the conduct of the accused if he were not aware of the blue package and contents before he opened the boot at the scene? In the first place, if that were the case, it might well have been that the accused might not have opened the boot at all. But if the accused had to open the boot for one reason or other, and then upon opening the boot to unexpectedly find a strange package in the boot of his car, should not the act

of the accused be to examine that strange package? And if the accused had examined that package and only got to know then of the incriminatory contents, then why was the reason for the conduct of the accused being that strange, that strange to the extent as to arouse the suspicion of SP5, a suspicion that was vindicated in the event by the discovery of the package of cannabis, and to run from the scene upon arrival of the police. Conversely, if that package was not examined by the accused, was it not the likely case that that package could have remained in the boot of the car? If the accused had not examined the package and or had no prior knowledge of the incriminatory contents, then why had the accused to so hurriedly dispose of the package? Why had the accused to straightaway open the boot and throw away the package like a hot potato? What was the reason that entailed the accused to throw the package there and then at the scene? When all things are considered, the situation and overt acts point only to knowledge. The reasonable deduction has to be, that the accused knew that there was a package containing cannabis in his car, both when he was driving the car and when he was opening the boot of the car at the scene. That is the big picture.

The aforesaid maximum evaluation of the prosecution evidence shows that by direct evidence the prosecution had proved that the accused was in actual possession of the cannabis in question, and that at the material time of possession the accused was consciously moving the said package containing the said cannabis from one place to another. The weight of cannabis in question is almost 100 times the stated weight that would attract the legal presumption of trafficking under s. 37(da) of the Act. That weight is not consistent with passive possession and or self-administration. Rather, the act of transporting that weight of cannabis is only consistent with the act of trafficking. The facts and circumstances, and the quantity of cannabis only say that it was trafficking. Even without legal presumptions, there is clear, strong, and credible evidence to each ingredient of the offence of trafficking. On that there is no doubt. The evidence is more than sufficiently strong for the accused to be called on to answer. To sum up, there is a *prima facie* case to answer. Consequently, the accused was called to enter his defence.

The accused was the only witness for the defence. He testified that on 2 May 1999 at about 8.45pm, while he was on his way to Johor Baru from Kampong Lebai Akir, his car (WBB 6888) skidded off the road at Kampong Temu Jodoh Chaah, Johor. On 2 May 1999, he was residing at Batu 5, Tampoi, Kampong Pasir, Johor. "Sebelum itu saya balik ke kampong. Saya balik pada pertengahan bulan empat. Isteri saya duduk di Johor tetapi saya telah hantar isteri ke kampong, sebab isteri saya hendak bersalin di kampong." He departed from his village at 1.30pm. On the way to Kampong Pasir, he stopped at 2 places – at a petrol station at Kuantan and at a food stall at Kuantan. His car skidded,

grazed a telephone pole and spun around, back towards the direction of Segamat. His car stopped at a dark place. He got out from the car. "Selepas kemalangan saya berjumpa dengan beberapa orang kampong. Orang kampong datang jumpa saya. Saya cakap dengan orang kampong saya tak perlukan pertolongan mereka, kerana sebelum pada itu saya telah hubungi kawan, selepas terbabas." That friend was Halim, who had a car repair workshop. "Saya tidak kenal dan tidak cam orang-orang kampong itu. 7 atau 8 orang kampong datang … dari arah seberang jalan." There were a provisions shop and a coffee shop, about 40-50 feet away on the other side of the road. Both were open for business. There were electric lights in those shops. At the place where his car had stopped, it was possible to see within a close distance, within 10 feet. Those villagers departed after he told them that he did not require their assistance. "Lepas orang-orang kampung beredar dari tempat itu, saya tengok tayar kereta pancit, bahagian depan sebelah kiri." There was a puncture to his left front tyre. He opened his boot "untuk mencari alat membetulkan kereta saya." He found a jack and spanner. He tried to jack his car. "Kemudian saya tengok arm steering kereta tercabut. Saya tak dapat betulkan sendiri. Saya cuba telephon kawan saya lagi sekali iaitu Halim yang sama." He informed Halim that his car must be towed. Halim told him to wait. He waited for Halim. While waiting for Halim, some persons arrived in cars that came from the direction of Segamat. Those persons got down from their cars and headed towards him. They were about 40 feet away from his car. "Apabila saya melihat orang meluru ke arah saya, saya terperanjat. Saya beralih ke tempat yang lebih terang, iaitu tak jauh dari kereta. Dua orang tangkap saya. Saya tanya apa salah saya. Tidak ada jawapan. Those persons who arrested him worn jackets emblazoned with the badge of the police. He was put inside a car on the other side of the road. Inside the car, he was handcuffed. He again asked what wrong had he committed. He got no answer. Not long thereafter 2 persons brought and put a plastic bag into the boot of the car he was in. Then Halim arrived. alim was arrested. Halim was also put inside the same car he was in. Then he was taken to the Chaah Police Station. He and Halim were put inside the same room. The car he was in brought the plastic bag to the Chaah Police Station. Prior to his arrest, he had not seen the plastic bag before. Prior to 2 May 1999, he was working in Singapore as a contract worker.

Under cross-examination, the accused testified that WBB 6888 was registered in his name and was his private car, and that he was the user of WBB 6888. On 2 May 1999, he was the sole driver of WBB 6888. His car skidded when he avoided a motorcyclist. The position of his car, after it skidded, was as in photographs P17(1 & 2). "Posisi kereta senget sedikit. Saya setuju boot kereta saya lebih dekat ke warong, berbanding dengan muka kereta." He could not say if the investigation officer had taken his photographs at the scene, or if the stalls were directly opposite where his car had stopped. He disagreed that

there were 6 stalls. He was not sure if all the stalls were open for business or if all the lights of the stalls were lit. He was not sure if the distance between his car and the stalls was about 35 feet. He disagreed that the place where his car had stopped was illuminated by light from the stalls. He could not remember if there were 2 road junctions nearby. He disagreed that the place where his car had stopped was illuminated by light from the streetlights at the road junctions. The stalls were not directly in front of his car. Persons at the stalls could see his car, as his car was white in colour. He agreed that one of the villagers spoke to him, but he could not say if it was SP5. He disagreed that that he drove away the villagers. He disagreed that he drove away the villagers to prevent them from knowing he was carrying drugs in the boot of his car. He disagreed that he was in a nervous (cemas) state when he drove away the villagers. He denied that the drug exhibits belonged to him. He denied that on the night in question he was transporting the drugs exhibits. He agreed that he had not expected that there would be an accident or that SP5 and the villagers would offer their assistance to him. He agreed that after the villagers departed he opened the boot of his car. He denied that he opened the boot of the car, removed the drug exhibits, and then threw the same to the side of the car, to the top of the embankment, about 1 or 2 feet away from the car. He disagreed that SP5 witnessed the drug exhibits being thrown by him. He disagreed that he threw the drug exhibits to prevent it being found in his car. He denied that he threw the drug exhibits to a nearby place so he would recover it later. He denied that he did not leave the place of the accident so as not to lose the drug exhibits. He was waiting for Halim. He denied that he ran when he saw the police land rover stopping about 10 feet away from his car. He did not see the land rover arriving. There was no police land rover. There were only cars. He did not see police personnel alighting from those cars. He only saw that those persons who alighted from those cars were police personnel when they were near. He did not run. He was arrested but he did not run. He could not remember if he was arrested near the place shown in photograph P19(2). He disagreed that after he was arrested he was taken to the place of his stationary car. After he was arrested, he was put inside a car parked on the other side of the road. He did not see the police searching the area near his stationary car. He did not see SP5 speaking to SP6, or SP5 pointing out to SP6 the direction in which the package was thrown. He did not see the police proceeding towards the direction pointed out by SP5 or the police recovering the package. He denied he was near his stationary car and witnessed the events related by the police witnesses. He denied he was only handcuffed after the discovery of the drug exhibits. He was handcuffed inside the car. He had no knowledge of the discovery of any package, except that the police brought a package when he was inside the car. He had no impression of the colour of the package. He telephoned Halim before he attempted to repair his car. He

was not sure if Halim arrived about an hour after he telephoned Halim. He had to send his car to Halim's workshop in Kluang. He agreed that SP5 and police witnesses were not known to him at the material time. He disagreed that SP5 and other police witnesses had no reason to falsely implicate him. He agreed that throughout the duration of the journey from Kelantan to the place of the incident, "kereta WBB 6888 di bawah kawalan dia sahaja". He denied that his version of events is a fabrication.

Under re-examination, the accused said that his version of events is true, that the distance between his stationary car and the stalls was about 45 feet, that there were only 2 stalls, that he did not drive away the villagers, that prior to his arrest he had not seen the drugs exhibits, that he took out tools to repair his car from the boot of his car.

At the close of the defence, Miss Latifah submitted that the prosecution has the burden to prove its case beyond reasonable doubt but an accused has only the evidential burden to cast a reasonable doubt. Learned counsel repeated her earlier submission that the evidence of SP5 must be doubted. Given the light condition, and SP5 agreed it was dark, how much could SP5 have seen from a distance of 35 feet? SP11 testified that it was dark and that there was clear vision only within 10 feet. SP5 only said that the blue package (P6B) "adalah lebih kurang sama dengan yang saya lihat". "Lebih kurang" is tentative and is not good enough. The accused took out "alat membaiki kereta". The accused explained why had not accepted the assistance of SP5 and friends. The accused had contacted Halim. The accused explained that he was at the scene waiting for Halim. In fact, Halim did appear at the scene. It was reasonable for the accused to run, as unknown persons were heading towards him. There was no reason for the accused to throw any incriminatory articles, as any incriminatory articles of the accused would have been safer in the boot. If the accused had wanted to distance himself from the drugs, he could very easily have fled from the scene. "The accused knew that Halim was coming, and it was more reasonable to wait for Halim and not to throw away the incriminatory articles." The chemist did not state the weight of the samples. 10% of the weight must be tested. The arrest was wrongful. The accused was not told of the reason for his arrest. Learned counsel repeated her submission that arts. 5(1) and 5(3) were offended. "The arrest was not lawful, mereka keseluruhan tidak sah".

Relying on the authority of *Mohamad Radhi bin Yaacb v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, learned DPP submitted that legal presumptions must be rebutted on a balance of probabilities. Learned DPP contended that there is no doubt on the primary fact of possession. The defence was an afterthought. There was a failure to cross-examine (learned DPP submitted the authorities of *Wong Swee Chin v. PP* [1981] 1 MLJ 212, and *PP v. Lin Lian*

Chen [1997] 2 MLJ 561). The defence had not challenged the testimony of SP5 (learned DPP highlighted the particular parts). The sketch plan was not challenged. It was not put to SP5 that the accused opened the boot to remove a jack and a spanner. The story of a jack and spanner was not put to any of the prosecution witnesses. In fact, only the blue package was found. No jack or spanner or other package was found at the scene. The police were in uniform. It was not challenged that the accused was about 10 feet from the car. The accused could see who were heading towards him. The entire defence case was not put during the prosecution case. Besides light from the stalls, there was light from the boot light. SP5 could see what was being taken out from the boot. There was no break in the chain of evidence relating to the blue package. The defence was a denial. Mere denial is not sufficient (learned DPP referred to *PP v. Ling Tee Huah* [1982] 2 MLJ 324). The conduct of the accused was not consistent with innocence. He drove away those who came to help him. All witnesses did not know the accused and had no reason to falsely incriminate the accused. The accused ran when he saw the police. There was no reason for the accused to run if he was innocent. The accused was the owner of the car. The accused agreed that the car was always under his control. It was impossible that the accused would not know what was being carried in the boot. The accused knew why he was arrested.

Miss Latifah replied that the accused was not found in possession and that s. 37(da) would not apply. The defence was put at the stage of the prosecution case. "Found in possession means actual custody or control."

It is efficacious to begin with a short survey on the law relating to failure to cross-examine witnesses on a crucial aspect of the case. The leading authority is *Wong Swee Chin v. PP* [1981] 1 MLJ 212, 213, where the Federal Court per Raja Azlan Shah CJ (as HRH then was) said:

> Mr Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120 where Haslam J said at p. 122:

> In *Phipson on Evidence* (11th Ed) para 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where
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> ... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

That it is not necessary to put the same question to all witnesses was said again most recently in *Lee Ing Chin @ Lee Teck Seng v. Gan Yook Chin* [2003] 2 CLJ 19, where Gopal Sri Ram JCA held that "there was no obligation in law on the counsel's part to put the same question to PW9 as he had put to PW3 in respect of the 11 May incident". It has also been said that "… counsel … is bound to put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness or in which that witness had any share …" (*Saul Hamid bin Pakir Mohamad v. Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800 per Zaleha Zahari J)

Wong Swee Chin was first followed in *PP v. Abang Abdul Rahman* [1982] 1 MLJ 346, 348, where Tan Chiaw Thong J complemented as follows:

> This case, again, emphasized the need for cross-examining a witness on matters disputed by the defence which form part of the defence. In *Public Prosecutor v. Mohd Isa bin Awang & Anor* Kedah Criminal Trial No 26 of 1978 (unreported), the learned trial judge stated in his judgment on the matter of cross-examination:
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> > It is right and proper that the witnesses should be challenged in the witness box, or at any rate that it should be made plain while the witness is in the box that his evidence is not accepted.
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> This, however, the defence has failed to do so. (See *Re Pichi Muthu, supra; Chua Beow Huat v. Public Prosecutor* [1970] 2 MLJ 29 and *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359). In the last-named case, it was held, *inter alia*, that:
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> > Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead

evidence by producing witnesses. This much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.

At page 362, in giving the reasons for this decision, Mukharji, J said (at paras. (11) to (13):

(11) On this point the most important and decisive authority is *Browne v. Dunn* reported in [1893] 6 R 67. It is a decision of the House of Lords where Lord Herschell, LC, Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report observed:

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

(12) Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said:

My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

(13) In fact Lord Halsbury described the situation as a 'perfect outrage' at page 77 of the said report.

And both *Browne v. Dunn* and *AEG Carapiet v AY Derderian* (both cited in *Chua Beow Huat v. PP* [1970] 2 MLJ 29) were followed in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen* [1995] 3 CLJ 639, where Gopal Sri Ram JCA said that the rule requiring a party's case to be expressly put to his opponent's material witnesses when they are under cross-examination applies to both criminal and civil trials:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

The whole point and purpose of the defence having to put its case to the prosecution witnesses, was made patently clear in 2 judgments of the apex court. In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, the then Supreme Court per Edgar Joseph Jr. SCJ elucidated:

> A final point needs to be made. The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

And in *Alcontara a/l Ambrose Anthony v. PP* [1996] 1 CLJ 705, Edgar Joseph Jr FCJ further explicated:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond all reasonable doubt.

To the learned observation of Edgar Joseph Jr. FCJ, the Court of Appeal in *Mohan Singh a/l Lachman Singh v. PP* [2002] 3 CLJ 293 added:

> To that learned observation we would merely add this. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. That has always been the law. It is still the law. Per Gopal Sri Ram JCA.

Therefore, it is most settled law that the failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony *(Wong Swee Chin)*, or "tantamount to accepting the truth of the witness's testimony" (*PP v. Mohd Amin bin Mohd Razali & Ors* [2002] 5 CLJ 281 per Zulkefli J), and that if the defence is sprung in court for the first time when the accused makes his defence or the prosecution is taken by surprise the accused runs the risk of his defence being branded a recent invention *(Lin Lian Chen)* and the weight to be accorded to his defence will be detracted *(Alcontara a/l Ambrose Anthony).*

The narrative of the accused was that there was a puncture to his left front tyre, that he opened the boot to look for tools to fix the punctured tyre, that he found a jack and spanner, that he tried to jack the car, that later he found that the steering arm of the car had become detached (cabut), that he could not repair the car himself, that he telephoned Halim, his friend and the owner of a car repair workshop, to tow his car, and that he waited for Halim. According to the accused, that was the sequence of the events prior to arrival of the police. In the words of the accused, "Lepas orang-orang kampong beredar dari tempat itu, saya tengok tayar kereta pancit, bahagian depan sebelah kiri. Kemudian saya buka boot kereta saya, untuk mencari alat membetulkan kereta saya. Saya jumpa jack dan spanner. Saya cuba jack kereta. Kemudian saya tengok arm steering kereta tercabut. Saya tak dapat betulkan sendiri. Saya cuba telephon kawan saya lagi sekali iaitu Halim yang sama. Saya katakan kepada Halim bahawa kereta saya terpaksa tarik. Halim kata tunggu. Saya tunggu Halim" (see pp. 143-144 of the notes of proceedings).

As for the sequence of events after arrival of the police, the narrative of the accused was that two persons unbeknown to him headed towards him, that he was startled (terperanjat), that he moved to a brighter place not far from his car, that he was arrested, that he asked the reason for his arrest, that he was taken to and put inside another car parked across the road, that not long later two persons brought and placed plastic bag into the boot of the car he was in, that thereafter Halim arrived and was arrested and put in the car he was in, that thereafter he was taken to the Chaah Police Station together with Halim and the plastic bag in the same car, and that prior to his arrest he had not seen the plastic bag before.

In a word, the essential defence was that the said package containing cannabis was never in WBB 6888, that there was no nexus between the accused and the package containing cannabis, and that the accused opened the boot only to look for tools to fix the puncture to the left front tyre of the car. That essential defence was maintained by the accused whilst under cross-examination. The accused denied, that the said package containing cannabis was in the boot of his car, that the said package containing cannabis had belonged to him, that he was transporting the said package containing cannabis for the purpose of trafficking, that he opened the boot not to obtain repair tools but to remove the package containing cannabis and to throw it to the side of the car, that he threw the said package containing cannabis to the top of the earth embankment near his stationary car, that SP5 witnessed him doing such acts, that he threw away the said package "supaya dadah tak akan dijumpai di dalam kereta", that he remained at the scene "sebab tak mahu kehilangan dadah itu", that he ran when he saw the police land rover, that he saw it was the police, that there was a police land rover, that he ran, that after apprehension he was brought to the area of his stationary car, that he witnessed the police searching the immediate area of his car, that he witnessed SP5 arriving at the scene and pointing the direction in which the said package was thrown, that the police proceeded in the direction indicated and recovered the said package, that he was in the area of his stationary car when the police recovered the said package and witnessed the recovery of that package, that at that material time he was guarded by SP10 and Lance Corporal Asnor, or, that he was only handcuffed after the recovery of the said package from the top of the earth embankment, (see pp. 149-156 of the notes of proceedings).

As could be seen from the latter challenges by the prosecution and denials by the accused, in so far as the prosecution was concerned, the entire defence was strenuously challenged. But what about the defence? Had the defence challenged the crucial aspects of the prosecution case, and or put its case at the earliest possible stage? Or was the defence sprung for the first time when the accused made his defence from the witness box?

One critical aspect of the prosecution case was that the accused opened the boot and removed the said package and then threw that package to the right front side of his car. That evidence was adduced by the prosecution through SP5. In her examination of SP5, defence counsel put to SP5, that the accused was already out of the car when SP5 and friends arrived at the scene (to which SP5 disagreed), that the "tempat kemalangan kereta tersebut merupakan satu tempat yang gelap (to which SP5 agreed), that SP5 "tidak lihat apa bentuk barang yang diambil dari boot kereta kamu cuma lihat satu benda dikeluarkan, kamu tidak lihat warna dari kegelapan" (to which SP5 answered, "boot ada

lampu dan saya nampak satu bungkusan dikeluarkan"), that the accused did not run (to which SP5 answered "OKT berlari-lari anak … ke (arah) Yong Peng"), and that it was not the police but SP5 who discovered the said package (to which SP5 answered, "Polis yang jumpa, saya cuma tunjukkan arah tempat bungkusan") (see p. 33-36 of the notes of proceedings). That was all that was put by the defence to SP5. So clearly, the defence had not put its case – there was a tyre puncture, the accused opened the boot to look for tools to fix the punctured tyre, the accused found a jack and spanner, the accused tried to jack the car, later the accused found that the steering arm of the car had become detached and the accused could not repair the car himself, that the accused had not seen the package before – at the earliest possible stage. In addition, the defence had not challenged the testimony of SP5 that the accused threw a package to the right front side of his stationary car, that SP5 informed SP6 of the direction in which the package was thrown, and that the accused was the only person near his stationary car.

In her examination of SP6, defence counsel put to SP6, that he had not chased the accused (to which SP6 disagreed), that the accused was apprehended near WBB 6888 (to which SP6 answered "tidak"), that the photograph of the package on top of the embankment was taken after the package was "alih" (to which SP6 answered, "Bungkusan masih ada di atas tebing, belum dialih"), that the accused was not at the scene but was inside SP11's car parked near the stalls when the package was discovered (to which SP6 answered, "OKT ada dekat kereta terbabas, di bahagian boot belakang"), that the police vehicles stopped on the right side, that is, near the stalls, and not on the left side of the road towards Yong Peng (to which SP6 disagreed), and, that what really happened was as reported in his police report (P20) (to which SP6 agreed) (see p. 60-62 of the notes of proceedings). Evidently, the defence had put its case that the accused did not run and was apprehended near the stationary car, that the accused was inside SP11's car parked on the opposite side of the road at the material time when the said package was discovered. But also evidently, the defence had not challenge the testimony of SP6 that upon the arrival of the police the accused was the only person near his stationary car, that SP5 pointed out the direction in which he saw a package being thrown, and that SP6 together with SP8 and SP11 discovered the said package on top of the embankment. And the defence had not put its case (SP6 testified that he apprehended the accused and that the package was in his custody when he returned to Chaah Police Station in the police land rover) that he demanded the reason for his arrest, and, that the package was carried in SP11's car to the Chaah Police Station. There was no prior notice of the defence that the accused had not seen the package.

The examination of SP8 by the defence also left much to be desired. It was only put to SP8 that he had not pursued the accused (to which SP8 disagreed), and, that the streetlights were not for the convenience of users of the main road (to which SP8 disagreed) (see pp. 78-82 of the notes of proceedings). The rest of the testimony of SP8 was not challenged. And the unchallenged testimony of SP8 was that whilst giving chase he heard shouts "yang larikan ialah pemandu kereta terbabas", that the accused was brought to the area of the stationary car, that Lance Corporal Asnor and SP9 guarded the accused, that SP6, SP8 and SP11 searched the area, that SP5 and friends walked over to the scene and SP5 indicated a direction to SP6, that SP6 and SP8, proceeding in the direction indicated by SP5, then discovered the said blue package, that the dog unit did not find anything, that the accused was escorted to the Chaah Police Station by SP8 and SP11, that the food-stalls were open for business and its lights were lit, that the area near the car was illuminated by light from the food-stalls, and that it was bright in the vicinity of the car. Again in the examination of SP8 by the defence, there was no prior notice of the defence that the said package was placed in SP11's car, and, that the accused demanded the reason for his arrest.

SP9 was not examined by the defence. Consequently, the entire testimony of the police officer heading the dog unit was unchallenged. To recapitulate, SP9 testified, "Lepas saya turunkan anjing dadah. Ada buat pemeriksaan di luar and di dalam kereta, Tidak jumpai apa-apa barang salah. Saya buat pemeriksaan meliputi kawasan 50 meter sekeliling kereta. Saya mengambil masa 20 minit untuk menjalankan pemeriksaan. Saya tidak guna lampu suluh, sebab is agak cahaya".

In her examination of SP10, defence counsel put to SP10 that the accused was apprehended near his car (to which SP10 disagreed), that SP6, SP8 and SP11 proceeded to a spot shown in photograph P17(1), to the right front side the car (to which SP10 agreed), and, that SP6 SP8 and SP11 proceeded to a place "agak tinggi" (to which SP10 replied, "tebing sedikit") (see pp. 92-95 of the notes of proceedings). Still there was no prior notice of that aspect of the defence that the accused demanded the reason for his arrest.

The examination of SP11 by the defence had to do with the role of SP11 during the pursuit of the accused, the shouts from across the road, the persons who approached SP6, whether SP11 followed SP8 to the place indicated, the photograph of the package on top of the embankment, the removal of the package from the embankment to the stationary car, whether SP8 helped SP6 to bring the said package down from the embankment, the time taken in the initial search, and, the place where the accused was apprehended. Other than

those questions, probably to test and crosscheck the accuracy of the facts deposed by SP11 and or other witnesses, nothing was put to SP11 by way of any challenge of the rest of his testimony.

Nothing was revealed by the defence, even at the late stage of examination of the last prosecution witness at the scene, of its case, to wit, that there was a tyre puncture, that the accused opened the boot to look for tools to fix the punctured tyre, that the accused found a jack and spanner and tried to jack the car, that later the accused found that the steering arm of the car had become detached and that the accused waited for Halim to tow his car, that the accused was startled by the sudden appearance of two persons heading towards him, that the accused moved to a brighter place, that the accused demanded the reason for his arrest, that the accused had not seen the said package before his arrest. That narrative was only revealed for the first time when the accused made his defence from the witness box. The prosecution would not have not been surprised. Consequently, there is no choice but to brand the narrative of the accused as a recent invention. The fact of the matter is that if it was not a recent invention, then why was it not raised at all earlier?

In *Alcontara a/l Ambross Anthony*, Edgar Joseph Jr. FCJ. held that where the defence is a recent invention or "kept up the sleeve" then it will detract therefrom the weight to be accorded to the defence. Nevertheless at p. 218, His Lordship counselled:

> … it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

That the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution was also particularly stressed by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, 216:

> It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night.

Sharma J, in *PP v. Saimin & Ors* [1971] 2 MLJ 16, 17, thus explained the meaning of 'reasonable doubt':

> The following definition of 'reasonable doubt' is often quoted:
>
> > It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that "'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there." Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

Abdul Wahab Patail J, in *PP v. Kesavan a/l Petchayo* [2001] 7 MLJ 144, and following *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373, thus expounded:

> A reasonable doubt is thus not a doubt that is merely theoretically possible, but one that given all of the facts of the case is a doubt that is possible but not in the least probable. While it is always possible with a little ingenuity to create a story which raises a possible or theoretical doubt, the factual nature and circumstances of the particular case may show that such possible or theoretical doubt was not in the least probable in that case, and thus no reasonable doubt arises. If such possible or theoretical doubt is in the least probable, then the court must hold there is reasonable doubt. However, mere denial, without other proof to reasonably dislodge the prosecution's evidence is insufficient: *PP v. Ling Tee Huah* [1982] 2 MLJ 324.

According to Buhagiar J in *Saminathan & Ors v. PP* [1955] MLJ 121 and echoed by the Court of Appeal in *Lt Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md Amin & Anor* [1997] 2 CLJ 752, the best definition of 'reasonable doubt' is perhaps that given by Denning J in *Miller v. Minister of Pensions*, where his Lordship said (at p. 373):

> The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Is there a reasonable doubt in the present case? The accused testified that he opened the boot to look for tools to fix or replace the puncture tyre, that he found a jack and spanner, and that he tried to jack the car. With regard to that aspect of the defence, it must be noted that it was established evidence that the stationary car was facing the direction of Segamat. The accused himself agreed that the position of his stationary car was as that in the police photographs (P17), that is, facing the direction Segamat. It means, that the left side of the stationary car was the side exposed to the view of those at the stalls across the road. The accused testified that there was a puncture to his left front tyre. So if indeed the accused had tried to jack his car, he would have to do so at the position of the left front wheel and nowhere else, and it would reasonably have been witnessed by SP5 who had his eyes peeled to the accused. But no such overt act of the accused, the attempt to jack the stationary car, was mentioned by SP5. The defence contended that given the poor light SP5 would not have been able to see clearly across the road. The defence submitted that SP5 only said that the blue package "adalah lebih kurang sama dengan yang saya lihat" and that 'Lebih kurang' is tentative and is not good enough identification of the said package. "The accused took out alat membaiki kereta." But that evidence of SP5 was taken out of context. First SP5 testified, "Bungkusan itu agak besar. Bungkusan itu berwarna biru kehitaman, berdasarkan cahaya pada malam itu. OKT campak bungkusan itu ke sebelah tempat pemandu". Next, when shown a photograph of the drug exhibits, SP5 said "Keadaan bungkusan yang lihat adalah lebih kurang sama dengan barang yang dilihat di P18(1"). It was in that context that SP5 said "adalah lebih kurang sama dengan yang saya lihat". Later, when shown a further photograph of the drugs exhibits, SP5 testified "Barang yang di lihat di P19(2) adalah barang yang saya maksudkan". Lastly, when shown the blue plastic package itself (P6B), SP5 said "ID6B adalah gunny sack yang nampak dicampak. Tetapi pada masa itu ada isi. Sekarang kosong. Saya tidak tengok apa isi kandungan". There is no doubt that SP5 had accurately described and indelibly identified the said package. But could SP5 have missed the attempt to jack the car? Well, the established evidence would vouch that SP5 was a keen and observant witness. SP5 testified that the car skidded when it attempted to avoid a motorcyclist entering the village – "saya lihat kereta itu cuba mengelak sebuah

motor" (see p. 27 of the notes of proceedings). And the accused unwittingly affirmed that SP5 was an accurate witness, for the accused himself confirmed, "Kereta saya terbabas sebab saya cuba mengelak sebuah motorsikal" (see p. 146 of the notes of proceedings). And obviously, SP5 could not have been so keen and so accurate in his observation if he could not see across the road. It was not realised, but the accused himself affirmed that the persons at the stalls could see to a reasonable distance. The learned DPP asked, "Pada malam itu orang-orang di warong boleh melihat kereta terbabas", and the accused answered, "Kereta boleh nampak, sebab warna putih". All said, if it were true, SP5 would not have not seen the alleged attempt to jack the car. If it were true that there was an attempt to jack the car, then such evidence could have adduced by the defence during its examination of SP5. There was no reason for SP5 to lie. If it were true that there was such an attempt to jack the car, then there ought to have been a jack and or spanner at the scene. Now given that not a single question was asked of the prosecution witnesses on the alleged attempt to the jack the car, was it not too late to ask the court to believe the 'jack the car' story? It must be too late to ask the court to believe that the accused only opened the boot to look for tools to fix the tyre puncture.

But even if it is not too late, the story that the accused opened the boot only to look for tools and only removed repair tools could not be believed in the light of the total evidence. The accused denied that he opened the boot and removed the said package from the boot of the car. The accused said that he opened the boot and removed tools to fix the tyre puncture. Reasonably, there should be a jack and spanner at the scene. But there was no jack or spanner of any description at the scene. There was no evidence as would be consistent with there being a jack or spanner at the scene. There was no evidence as would be supportive of the possibility of the fact that there could have been a jack and hammer at the scene. A reasonable doubt must arise from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence. But there was no such evidence as could give rise to a reasonable doubt. Apart from the jack and spanner story, the rest of the defence was a denial, in the main of even the most established of evidence. But a denial is not a sufficient response. Albeit the large quantity of drugs involved, there was no attempt to displace the inescapable inference that it was trafficking. There is no evidence as could suggest that it could have been passive possession or anything else for that matter but trafficking. Having regard to the evidence and circumstances as a whole, the accused had not cast a reasonable doubt on the prosecution case or on guilt. Having regard to the evidence as a whole, the prosecution had proved guilt beyond a reasonable doubt.

There is one other issue to be addressed. The defence contended that the friends of SP5 were not named nor made available to the defence for cross-examination. Defence counsel probably had an eye on the authority of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, where it was held by the then Supreme Court, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has also the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt, or at the very least, the prosecutor should make them available for cross-examination by the defence, and if the prosecution failed to fulfil this duty, the accused must be acquitted. Except that that was not the situation here. All witnesses essential to the unfolding of the narrative of the prosecution case had been called. Albeit that the friends of SP5 were not named nor called to take the stand, there was no gap in the narrative of the prosecution. Besides, it was recently held by the Court of Appeal per Gopal Sri Ram JCA in *Jonaidi bin Mansor v. PP* [2002] 2 CLJ 730, that not every failure by the prosecution to call or offer relevant evidence occasions a failure of justice. The prosecution could not be expected to trace and call each and every person present at the scene. The burden on the prosecution is to prove the charge beyond all reasonable doubt. And that was done in the present case, without any gap or break in the evidence and without the aid of legal presumptions. There is no doubt whatsoever that the accused was trafficking. All evaluation of the evidence for the prosecution and defence gave that result. Accordingly, in convicting the accused on the grounds herein, it is hereby ordered that the accused do suffer the only sentence permitted by law and that he be hanged by the neck till he is dead.